(1)

90-497

Case No. _____

IN THE

United States Supreme Court

OCTOBER TERM, 1990

JAMES WILLIAMS,

Petitioner,

v.

JAMES A. CHRANS, Warden of Pontiac Correctional Center, and NEIL F. HARTIGAN, Attorney General of the State of Illionis,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BARRY LEVENSTAM
(Counsel of Record)

ROBERT T. MARKOWSKI
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

LISA I. FAIR
Law Offices of Michael J. Rovel
875 N. Dearborn Street
Chicago, Illinois 60610
Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

(1) Whether Mr. Williams' due process right to present his defense was violated by the trial court's refusal to admit evidence that police had intimidated key witnesses, a ruling that had the effect of foreclosing Mr. Williams' "frame-up" defense and therefore conflicted with this Court's opinion in Chambers v. Mississippi, 410 U.S. 284 (1973), and subsequent cases.

(2) Whether Mr. Williams' sixth amendment right to confront witnesses was violated by the trial court's refusal to admit evidence of police misconduct for the purpose of impeaching State witnesses, including testifying officers who had participated in the misconduct, a ruling that conflicted with this Court's opinion in Davis v. Alaska, 415 U.S. 308 (1974), and subsequent cases.

(3) Whether Mr. Williams' due process right to a fair trial was violated

by the outrageous conduct of the police that included intimidation and coercion of witnesses to obtain his conviction, conduct that this Court held in United States v. Russell, 411 U.S. 423 (1973), and subsequent cases to preclude a conviction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the Illinois Appellate Court, First District affirming Williams' conviction is reported at 137 Ill. App. 3d 736, 484 N.E.2d 1191 and included in the Appendix at A-58. The opinion of the United States District Court for the Northern District of Illinois (Williams, J.) granting summary judgment for the state on eight counts of Williams' petition for writ of habeas corpus is not reported and is included in the Appendix at A-1. The opinion of the same court granting summary judgment for the state on the remaining three counts of the Williams' petition is not reported and is included in the Appendix at A-44. The opinion of the United States Court of Appeals for the Seventh Circuit affirming the denial of Williams' petition for writ of habeas corpus is not reported and is included in the Appendix at A-86.

JURISDICTION

On June 20, 1990, the United States Court of Appeals for the Seventh Circuit entered judgment affirming the district court's denial of Williams' petition for a writ of habeas corpus. Jurisdiction of this Court to review the Seventh Circuit's judgment by writ of certiorari arises under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The constitutional provisions involved in this petition are the sixth and fourteenth amendments to the United States Constitution, which respectively provide in relevant part that:

1. "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor," and

2. "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

The Police Focus On Mr. Williams After The Shooting

On June 29, 1982, Robert Love was shot to death in Brian's Lounge, a neighborhood bar on the west side of Chicago. Police officers arrived almost immediately after the shooting (Tr. 539, 587) and began conducting interviews. (Tr. 574-76.) The police admitted that they had no suspects the night of the shooting. (Tr. 190, 646-47, 851.) Nonetheless, for reasons never explained, four unidentified police officers conducted an unauthorized entry and search of Williams' apartment within an hour or two of the shooting. (Tr. 100-03.)

The Police Interview Six Regular Patrons Of The Bar, Three Of Whom Admit Being Coerced Into Identifying Mr. Williams

Having obtained no evidence against Williams from witness interviews at the scene of the shooting or from the unauthorized search of Williams' apartment, the police took six regular patrons of the tavern to police headquarters for questioning over the course of the next few days. Three of these regulars -- Margaret Russell, Emma Ginns, and Carl Beasley -- admitted during a suppression hearing that they had been locked up for more than 24 hours during which time they were physically abused and forced by police officers, including two of the State's witnesses -- Detectives Rave and Cozzi -- to identify Williams as the assailant. (Tr. 56-71, 89-97, 171-184.)

Russell, Ginns, and Beasley's description of police misconduct is supported in key respects by the testimony

of Rave and Cozzi, who admitted that all three witnesses were kept overnight at police headquarters despite the fact that they were never suspects. (Tr. 154-55, 200-02.) Rave admitted that he could not recall giving them anything to eat the second day of their incarceration. (Tr. 203.) He also conceded that the three witnesses identified Williams at roughly the same time in the afternoon of the second day. (Tr. 206.) Finally, Rave admitted that Russell, Ginns, and Beasley were permitted to go home only after identifying Williams in the early evening hours of July 2, having spent more than 24 continuous hours in custody at police headquarters. (Tr. 205-06.)

Two Of The Other Three Regulars Questioned By Police Testify Against Mr. Williams At Trial

The defense presented the evidence of police misconduct to the trial court during a suppression hearing. The State

avoided a ruling on its misconduct by striking Ginns and Russell from its witness list and representing that it would not use Beasley's out-of-court identification at trial. (Tr. 320-21.)

The State did, however, call two other regulars to testify at trial. Like Russell, Ginns, and Beasley, Charles Clemons was taken to police headquarters on July 1, where he viewed a line-up that included Williams. (Tr. 588-89, 664.) After telling the officers conducting the line-up that he could not identify the assailant, Clemons told them that the assailant had been wearing a dark cap at the time of the shooting. (Tr. 599.) According to Clemons, the police officer then "had [Williams] put on a cap." (Tr. 589.) Nonetheless, Clemons was still unable to identify the assailant. (Tr. 590.) By the time of trial, however, Clemons claimed that he had selected

Williams in that line-up as a man who "looked something like the man that [he] caught a glimpse of but [he] wasn't sure." (Tr. 589.)

Lee Grady also testified against Williams at trial. The State had asked Emma Ginns whether she told the victim's brother that Williams, known as "Bill," had shot Robert Love. Ginns testified that she had not. (Tr. 802.) Grady then testified that Ginns told him after the shooting that she knew who had shot Robert Love. (Tr. 938-39.) The trial court, however, cut off defense attempts to establish that Grady's cooperation with the State came only after he had become aware of how the State had treated his friends Ginns, Russell, and Beasley when <u>they</u> failed to cooperate by identifying Williams. (Tr. 543-46.)

Andrew Tucker Volunteers An Identification Of Mr. Williams After Tucker's Mother Is Interrogated By Police

The State's key identification witness at trial was Andrew Tucker. Unlike Clemons, the only other identification witness, Tucker claimed that he was certain he had seen Williams shoot the victim. (Tr. 612.) The evidence, however, showed that Tucker did not come forward with his identification until a full week after the shooting, and only then after his mother, who had not been at the tavern the night of the shooting, had been brought to police headquarters (Tr. 632) -- apparently by the same officers that abused Russell, Ginns, and Beasley. (Tr. 653-54.)

Because the State never produced a police report concerning the interrogation of Rose Tucker, the defense called Cozzi to the stand to inquire into the date (or dates) and circumstances of Rose Tucker's interrogation in an attempt to determine

whether Tucker had come forward because of threats against or abuse of his mother. The trial court, however, precluded questioning on these matters as well. (Tr. 851.)

Isadore Glover Provides A Motive Only After Police Suggest That Mr. Williams Was The Assailant

On the day after the shooting, the police took Ginns down to police headquarters where they showed her a photograph of Williams and asked her whether she could identify that person as the person who shot Robert Love. Ginns, however, said that she could not identify the assailant. (Tr. 812.) Later that morning, Ginns went to visit the victim's brother, Isadore Glover, and spoke with him about the shooting. (Tr. 800-02.)

In the afternoon of the day after the shooting, after police had suggested to Ginns that Williams had shot Robert Love, Detective Rave interviewed Glover at the

police station. (Tr. 510-11.) According to the police reports, Glover then told police for the first time that his brother had been in a fight approximately four hours before the shooting with a man Glover knew as "Bill," and that this "Bill" had run off threatening to "see you later." (Tr. 191, 498-501.) Glover, however, had been present with police at the tavern and at the hospital shortly after the shooting (Tr. 524), but had not mentioned that his brother had been in a fight and threatened in Glover's presence that very afternoon. While at the station, Glover identified a photograph of Williams as being of the "Bill" who had fought with his brother (Tr. 639-40) and on the following day, identified Williams as "Bill" in a one man show-up. (Tr. 514-15.)

At trial, Glover stated that he was certain the fight had taken place at three o'clock because "shortly before that [he]

had looked at the clock and it was about quarter to three." (Tr. 519.) Glover also testified that after the fight, Love returned to his porch where they sat for approximately 45 minutes before Love left for the tavern. (Tr. 501-02.) Glover's testimony, however, was contradicted by Clemons who testified that Love was already at the tavern when he arrived after work at three o'clock. (Tr. 579.)

The Trial Court Denies The Pretrial Motion To Dismiss

In light of the police misconduct that led to the identifications of Williams by Russell, Ginns, and Beasley, the defense filed a pretrial motion to dismiss, asserting that police misconduct had violated Williams' constitutional rights. (R. 1240-45.) Specifically, the defense claimed that Williams could not get a fair trial because the police mistreatment of key witnesses to obtain identifications of

Williams interfered with his ability to present his defense.

Although the trial court denied the motion to dismiss, the court ruled that the jury would be permitted to weigh the evidence concerning the abuses committed in the police investigation with the rest of the evidence. (Tr. 406-07.) To the contrary, however, the trial court did not permit the jury to hear this evidence. The defense called Detective Rave to the stand intending to use him, as well as Ginns, Russell, and Detective Cozzi, to demonstrate that Tucker's testimony was the product of a police campaign of witness intimidation. (Tr. 701-02, 704-09.) The court ruled that this evidence was irrelevant because the evidence "would confuse greatly the true and genuine issue in this trial so far presented, whether or not the defendant is the actual shooter . . . ." (Tr. 703.)

On April 22, 1983, at the conclusion of the evidence that was presented, the jury found Williams guilty of murder. He was later sentenced to thirty years' imprisonment. On direct appeal, the Illinois Appellate Court affirmed the conviction, and the Illinois Supreme Court denied Williams' petition for leave to appeal. Having exhausted all available State remedies, Williams filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois on June 10, 1987. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343, and 2241. The court granted the State's motion for summary judgment and denied the petition. The court of appeals later affirmed the district court's judgment.

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals is in direct conflict with long-established precedent of this Court setting forth the rights of criminal defendants to present a defense, specifically, Chambers v. Mississippi, 410 U.S. 284 (1973), and to confront the witnesses against him, specifically, Davis v. Alaska, 415 U.S. 308 (1974).

2. The decision of the court of appeals has departed from the accepted and usual course of judicial proceedings by failing to issue a writ of habeas corpus to a man incarcerated in violation of his constitutional rights as a result of outrageous conduct on the part of the police officers investigating the crime for which he was wrongfully committed.

I. THE COURT OF APPEALS FAILED TO APPLY DIRECTLY CONTROLLING PRECEDENT OF THIS COURT AND THUS FAILED TO VINDICATE MR. WILLIAMS' RIGHTS TO PRESENT HIS DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM

A. Mr. Williams' Due Process Right To Present His Defense Was Violated By The Refusal To Admit Evidence To Support His Frame-Up Defense

In Chambers v. Mississippi, 410 U.S. 284, 302 (1973), this Court held that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." The Chambers Court reversed the defendant's conviction where the defense was precluded from eliciting testimony from witnesses that someone other than defendant had committed the crime. Accord Rock v. Arkansas, 483 U.S. 44, 55-56 (1987) (State "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony"; conviction therefore reversed where State applied "per se rule

prohibiting the admission at trial of any defendant's hypnotically refreshed testimony"); Crane v. Kentucky, 476 U.S. 683, 690-91 (1986) ("the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'"; accordingly, the court "erred in foreclosing petitioner's efforts to introduce testimony about the environment in which the police secured his confession"); Washington v. Texas, 388 U.S. 14, 19 (1967) (the "right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, . . . a fundamental element of due process of law"). Nonetheless, Williams was precluded from presenting the testimony of certain key witnesses in his defense.

Williams' primary defense was that the police immediately focused their investigation on him and created a case against him with false evidence.

Specifically, the theory of the defense was that the police first convinced Glover that Williams was the man who shot his brother and thereby obtained Glover's false testimony about a fight between Williams and Robert Love. The police then coerced identifications from potential witnesses through threats and torture directed against them or members of their family and dissuaded other witnesses from coming forward to exonerate Williams once news of their abuse reached the other regulars of the bar. Williams, however, was prevented from presenting this defense to the jury by the trial court's evidentiary rulings that precluded Williams from questioning either Ginns, Russell, and Grady or Detectives Rave and Cozzi on this subject. Williams therefore is incarcerated as a result of violations of his right to due process.

Specifically, Williams attempted to call Detectives Rave and Cozzi to the stand

as adverse witnesses to tell the jury how the police had focused their investigation on him before they had any suspects and then took extreme and coercive steps to obtain and create evidence against him. (Tr. 701-02.) His apartment was illegally entered and searched within hours of the shooting (Tr. 100-05, 772-75) before the police had any suspects (Tr. 190, 646-47, 851). He was later arrested without a warrant on the basis of nothing other than a hearsay statement by the victim's brother that someone named "Pussycat" told him that she had seen someone named "Bill" do the shooting. (Tr. 195-96.) After his arrest, Williams was neither read his Miranda rights (Tr. 108), nor permitted to see a lawyer. (Tr. 219-20.) He was then threatened and struck in an unsuccessful attempt to obtain a confession. (Tr. 220.) Potential witnesses were jailed and abused

until they falsely agreed to identify Williams. (See pages 4 to 5 above.)

Having secured the cooperation of these witnesses, Williams would have shown, these police officers attempted to strengthen their case by calling Rose Tucker to headquarters. (Tr. 632.) Soon after this unreported "interview," her son came to headquarters, asked for Detective Cozzi by name, and identified Williams. (Tr. 632.)

Nevertheless, after lengthy argument in which defense counsel explained the relevance and significance of this evidence and made a detailed offer of proof (Tr. 701-14), the trial court excluded it on the grounds that the testimony would "confuse the jury and shift the onus of the case over to the police department" (Tr. 707-08) -- in other words, place the burden of proof upon the State, where it rightfully belongs.

Williams also attempted to call Emma Ginns and Margaret Russell to testify about the treatment they received when they told the police they could not identify Williams as the assailant. (Tr. 709, 813.) The trial court prevented the defense from presenting this evidence to the jury on the same grounds (Tr. 709-10; 813-14), notwithstanding the fact that during the hearings on the motions to suppress and dismiss, the trial court did not find these witnesses unworthy of belief and did not find that the misconduct never occurred.

Third, Williams attempted to cross-examine Detective Cozzi concerning the treatment of Rose Tucker shortly before her son "voluntarily" appeared at the station asking for Detective Cozzi. (Tr. 851.) The defense wanted to establish that because Mrs. Tucker had not been present at the bar at the time of the shooting, she was not a potential witness. The police

had therefore called her down to the station to exert the same pressure on her to get at her son that they had exerted on Russell, Ginns, and Beasley to get identifications from them. Nonetheless, the court excluded this line of questioning, stating only that it was immaterial. (Id.)

Finally, Williams attempted to cross-examine Lee Grady about his meeting with Russell, Ginns, and Beasley immediately after their release from police headquarters to establish that he was aware of the treatment witnesses could expect if they did not tell the police what they wanted to hear. The trial court refused to allow defense counsel to elicit from Grady the fact that Ginns, Russell, and Beasley told him that the police had coerced statements from them. (Tr. 545-46.)

If the jury had been told of the brutal and extensive efforts of the police

to manufacture a case against Williams, they might well have decided that the police wanted Williams badly enough to (1) trick the victim's brother into helping them convict Williams with false testimony about the fight and the conversation with Ginns in which she allegedly stated that she knew who had shot Love, (2) directly or indirectly coerce the other state witnesses into falsely identifying Williams as the assailant, and (3) directly or indirectly coerce other witnesses into not identifying someone other than Williams as the assailant. Thus, Williams' "defense was far less persuasive than it might have been had he been given the opportunity" to present this evidence. See Chambers v. Mississippi, 410 U.S. at 294.

B. Mr. Williams' Sixth Amendment Right To Confront Witnesses Was Violated By The Refusal To Admit Evidence Of Police Misconduct To Impeach The State's Witnesses

In Davis v. Alaska, 415 U.S. 308, 316-17 (1974), this Court held that the possibility that a witness "might have been subject to undue pressure from the police and made [an] identification under fear" is indisputably a proper subject of full and searching examination under the sixth amendment. The Court therefore reversed a conviction where the defendant had been denied the opportunity to show the bias of a State witness who occupied the vulnerable status of probationer and who was concerned that he might be a suspect in the crime. See also Olden v. Kentucky, 488 U.S. 227, 230-33 (1988) (conviction for forcible sodomy reversed where defendant precluded from introducing evidence of victim's cohabitation with another to demonstrate victim's motive to lie about rape);

Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (defendant's right to confront witnesses violated by trial court ruling that prohibited "all inquiry into the possibility that [a prosecution witness] would be biased as a result of the State's dismissal of his pending public drunkenness charge"); United States v. Abel, 469 U.S. 45, 47-49 (1984) (district court properly admitted testimony of prosecution rebuttal witness to impeach defense witness by showing that defendant and defense witness were "members of a secret prison organization whose tenets required its members to . . . 'lie, cheat, steal [and] kill' to protect each other").

The State's case against Williams consisted of nothing more than the identification testimony of occurrence witnesses Tucker and Clemons. There was no physical evidence linking Williams to the shooting of Robert Love. There was no gun,

no evidence that Williams had a gun, no fingerprint, and no evidence that Williams owned any clothing like that allegedly worn by the assailant. Because the identification by Clemons was so uncertain, the State's case depended entirely on the credibility of one witness: Andrew Tucker.

Nevertheless, the trial court did not allow the defense to present to the jury the evidence of the bias held by the State witnesses, including Tucker. To the jury, Detectives Rave and Cozzi appeared to be police officers with no interest other than to uphold the law; Grady, Clemons, and most importantly, Tucker appeared to have no personal stake in the matter; and Glover, as the victim's brother doubtless appeared to be (and doubtless was) interested in convicting the man he was led to believe actually committed the murder. The trial court's ruling precluded the defense from informing the jury of the

outlandish and improper investigation conducted by Rave and Cozzi and of the likely pressure brought to bear by them on Tucker and the others.

Williams was foreclosed by the trial court from examining Detective Cozzi about the interrogation of Rose Tucker. (Tr. 851.) He was precluded from examining Emma Ginns about the abuse she suffered at the hands of the police and, therefore, about the other witnesses with whom she discussed her ordeal. (Tr. 709-10, 813-14.) He was precluded from examining Grady about his meeting with Russell, Ginns, and Beasley immediately after they were released. (Tr. 545-46.) The court's ruling below is premised on a circular argument within which Williams is trapped: he would be entitled to a writ if he could prove that Tucker, Clemons, or Glover were coerced, but the trial court, in the court's opinion, committed no error when it

prohibited questioning of the State's witnesses to obtain that proof. (See Appendix A-38.)

Such police coercion of witnesses was expressly found by this Court in both Davis v. Alaska, 415 U.S. 308, 316-17 (1974), and Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986), to be a subject of examination that cannot constitutionally be foreclosed to the defendant. By upholding the denial of a writ of habeas corpus, the court of appeals' decision directly contradicts the precedents of this Court.

II. THE COERCIVE EFFORTS OF THE POLICE TO OBTAIN WITNESSES AGAINST MR. WILLIAMS CONSTITUTED OUTRAGEOUS GOVERNMENT CONDUCT THAT VIOLATED MR. WILLIAMS' RIGHT TO DUE PROCESS.

Mr. Williams' petition for a writ of habeas corpus presents a shocking record of outrageous and unconstitutional misconduct on the part of the investigating

police officers. That misconduct irreparably infected the evidence to be admitted at trial and precluded discovery of potentially exonerating evidence in violation of Williams' constitutional right to due process. Accordingly, the trial court erred in denying Williams' pretrial motion to dismiss the information and the district court erred in granting the State's motion for summary judgment on Williams' petition for writ of habeas corpus.

This Court recognizes that the State may not obtain a conviction in cases, such as this one, in which police conduct is genuinely outrageous. See Rochin v. California, 342 U.S. 165, 209, 211 (1952) (conviction on charge of possessing morphine reversed where two capsules constituting chief evidence against defendant were obtained by pumping his stomach, State conduct that "shocks the

conscience" and offends due process); United States v. Russell, 411 U.S. 423, 431-32 (1973) ("conduct of law enforcement agents [may be] so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction").

In addition, due process precludes the use of testimony obtained by coercion. See, e.g., Napue v. Illinois, 360 U.S. 264, 269 (1959) (conviction reversed where obtained through use of known false testimony bearing on credibility of witness and thus in violation of due process); United States v. Chiavola, 744 F.2d 1271, 1273 (7th Cir. 1984) (defendant's right to a fair trial may be violated "when the government seeks a conviction through use of evidence obtained by extreme coercion"); United States ex rel. Wilson v. Warden Cannon, 538 F.2d 1272, 1277 (7th Cir. 1976) (denial of petition for writ of habeas

corpus reversed where obtained through perjured testimony of accomplices that they had not received prosecutorial promises of leniency in exchange for their testimony). See also Ex parte Bradley, 781 S.W.2d 886, 894 (Tex. Crim. App. 1989) (writ of habeas corpus granted on the grounds that improper police investigation procedures led to inherently unreliable testimony).

As set forth above, at pages 17 to 19, the police misconduct in this case was indeed outrageous, had the purpose and effect of coercing false testimony against the defendant, and irreparably tainted the evidence presented by the State at trial. Accordingly, Williams' petition for a writ of habeas corpus should have been granted. At the very least, sufficient evidence has been adduced to raise factual questions precluding summary judgment for the State. The district court erred in granting the State's motion for summary judgment.

CONCLUSION

For the reasons set forth above, petitioner James Williams respectfully requests this Court to grant his petition for a writ of certiorari.

Respectfully submitted,

BARRY LEVENSTAM
(Counsel of Record)
ROBERT T. MARKOWSKI
LISA I. FAIR

Attorneys for Petitioner

Dated: September 18, 1990

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel. JAMES WILLIAMS,	)	
Plaintiff,	)	
v.	)	No. 87 C 5242
JAMES A. CHRANS, Warden of Pontiac Correctional Center and NEIL F. HARTIGAN, Attorney General of the State of Illinois,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

At approximately 7:00 p.m. on June 29, 1982, while he waited for his turn at the card table in a bar on the west side of Chicago, Robert Lane was shot to death. The police investigation immediately focused on James Williams who was eventually charged with murder, tried and convicted. Having exhausted his state-court remedies, Williams petitions this court for a writ of habeas corpus. In this opinion, the court addresses the

parties' cross motions for summary judgment on the eleven-count petition.

Facts

As with virtually all habeas cases, a discussion of the relevant facts begins with what happened at the trial. Isadore Glover, the victim's brother, testified first for the State of Illinois. Glover testified that at about 3:00 p.m. on the day of the murder he witnessed an argument between the victim and Williams, whom Glover identified in court. Apparently, Williams owed the victim ten dollars. The intensity of the argument increased to the point where Williams punched the victim in the head. When the victim went after Williams with a crutch, Williams ran from the victim and said "I will see you later." Forty-five minutes later, the victim left for Brian's Lounge, a west-side tavern. Thirty minutes after the victim left, Glover left to join him at

the tavern. After talking with his brother, Glover returned home. Glover was later called back to the bar, where he saw his brother lying in a pool of blood. Glover testified that later he identified Williams in a photo spread as the man who had argued and fought with the victim at 3:30 p.m. on the date of the murder.

Lee Grady testified that he was in the tavern at the time of the shooting but could not see the assailant's face. During the cross-examination of Grady, the trial court sustained hearsay objections to defense counsel's questions regarding statements made by a "Mr. Beasley" to Grady on July 7, 1982. Record at 545-46.

Charles Clemons was a regular at the tavern and was present at the time of the shooting. Clemons testified that the victim was shot as the victim moved to take a seat at the card table. Clemons saw a man holding a gun with both hands before

Clemons fell to the floor to avoid further gunfire. When he stood up, the gunman was gone. Clemons further testified that two days after the shooting, on July 1, 1982, he viewed a lineup of five men, one of whom was Williams. At the time of the lineup, Clemons told an officer that Williams "looked something like the man that [Clemons] caught a glimpse of but [Clemons] wasn't sure." Id. at 589. Clemons then told the officer that the gunman had worn a cap. But even after the officer put a cap on Williams, Clemons "wasn't one hundred percent sure" so he could not make a positive identification. Id. at 590.

Andrew Tucker testified that he was Clemons' card partner the night of the shooting. Tucker had gotten up from the table and was bending over to pick up his coat when he heard the first shot. Tucker then tried to stand up but could not because the victim, who had been behind

Tucker, grabbed Tucker around the neck. Tucker turned to face the gunman who was standing six to eight feet away. The gunman fired another shot, the victim's grip weakened and Tucker dove to the side. Tucker identified Williams in court as the gunman and testified that he recognized Williams from the three years the two spent together in grammar school. Tucker further testified that he identified Williams in a photo spread on July 6, 1982 and in a lineup on July 13, 1982.

The State offered evidence to corroborate Glover, Tucker and Clemons' testimony. Detective Edward Rave of the Chicago Police Department testified that on June 30, 1982 Glover had made an identification of Williams from a photo spread. Detective Rave also testified that on July 13, 1982 Tucker identified Williams in a five-man lineup. Detective Robert Cozzi testified that on July 6, 1982 Tucker

identified Williams in a photo spread. Finally, Detective Michael O'Sullivan testified that Clemons at the time of the lineup told him that Williams "resembled" the gunman but that Clemons could not be sure.

Williams did not testify in the defense case, but a number of others did. Gregory Norman testified that he had hired Williams to renovate Norman's apartment. On the date of the murder, Norman and Williams bought paint in the afternoon and returned to the apartment at 5:30 p.m. to watch a news report concerning John Hinckley. Williams' mother-in-law, Fannie Strong, testified that she saw Williams painting Norman's apartment at dusk. Williams and Atlas Davis both testified that they saw Williams with Norman on July 29. Elizabeth Johnson confirmed that the Hinckley report aired at 5:30 p.m. on June 29, 1982 but conceded on

cross-examination that the same report ran a number of other unspecified days.

Emma "Pussycat" Ginns testified that she had been in the tavern at the time of the murder, but that she had not seen Williams in the tavern at all that day. On cross-examination, Ginns admitted talking to Glover the day after the murder but denied having told Glover that Williams was the one who had shot Robert Love.

Williams' wife Jacqueline testified first about a police search of the Williams' apartment at approximately 8:00 p.m. the day after the murder. After hearing a knock on the door, she opened the door and found three police officers standing with their guns drawn. Without permission to enter or a search warrant, the officers walked past her, asked if her husband was at home and searched the apartment for about five minutes. Jacqueline later told Williams what had

happened after he returned to the apartment. Jacqueline further testified that the next morning at approximately 6:00 a.m. the police returned. After opening the door, Jacqueline told the police her husband was in bed. The police again walked past her and into the bedroom where they arrested Williams.

Williams also called Detective Cozzi back to testify in the defense case. The trial court rejected defense counsel's request to conduct an adverse examination of Detective Cozzi, so objections to leading questions were sustained. Detective Cozzi essentially testified that he had interviewed a number of people at the tavern the night of the murder and from those interviews had obtained a composite description of the gunman. But as of the night of the murder, Detective Cozzi did not have a suspect in mind.

In rebuttal, the State called two witnesses to impeach Ginns. Glover testified that the day after the crime Ginns had told him that Williams was the murderer. Grady testified that the night of the murder Ginns had told him that she had seen and recognized the murderer.

The jury convicted Williams and the court sentenced him to thirty years imprisonment. The Illinois Appellate Court affirmed, see People v. Williams, 137 Ill. App. 3d 736, 484 N.E.2d 1191 (1st Dist. 1985), and the Illinois Supreme Court denied Williams' motion for leave to appeal. Consequently, Williams' petition is his last hope for reprieve. The court will address each of Williams' arguments for issuance of the writ separately.

I

Motion to Quash and Suppress

Prior to trial, Williams made a motion to quash his arrest and suppress

identifications made subsequent to his arrest, including any pretrial or trial identifications of Williams made by Ginns, Tucker, Margaret Russell and Carl Beasley. On January 31 and February 2, 1983, the trial court held a suppression hearing on that motion. Russell, Ginns and Beasley each testified about various acts of police misconduct at Area Four headquarters. The acts were designed to elicit an identification of Williams from them. Williams' wife testified in a manner essentially consistent with her trial testimony. Defense counsel questioned Detectives Cozzi and Rave about their interrogation procedures with Russell, Ginns and Beasley. Williams himself also testified. Detective Thomas McCarthy testified on behalf of the State regarding the circumstances surrounding Williams' arrest.

The parties later argued the merits of the motion. The State

represented that it had no intention of calling Ginns or Russell as witnesses in its case in chief and that it would not offer evidence of Beasley's out-of-court identification. The trial court indicated it would permit an in-court identification of Beasley, but Beasley in fact never testified at trial. As for the motion to quash the arrest, the trial court found that probable cause existed to arrest Williams. The trial court initially rejected Williams' assertion that he had asked for a lawyer within an hour of his arrest:

> Now, there is one other comment made by defense counsel not broadly gone into, that the defendant requested an attorney during the interviews I believe that was (sic) conducted by the State's witnesses. It will be a finding of the court that that was not adequately established by the defendant or the defense counsels

> (sic). And it is my understanding of the evidence before this court that Mr. Williams has given no admission or no confessions or no statements that implicate himself in the murder, to the police.

Record at 379-80. The court later indicated, however, that it considered the issue to be "ancillary" and expressed some confusion as to why defense counsel had raised the matter. Id. at 381. The trial court did not formally rule on Williams' motion to suppress Tucker's pre-trial and in-court identifications of Williams and admitted those same identifications at trial.

In its opening statement at trial, the state told the jury that Clemons would testify that he had identified Williams as the gunman although Clemons could not be positive. Id. at 489. Defense counsel subsequently objected to

the State's opening regarding Clemons because defense counsel maintained that Clemons' identification of Williams had never been disclosed to the defense. Id. at 505-06. Defense counsel made the same objection regarding Glover's testimony concerning a showup identification Glover made of Williams at Area Four headquarters on July 1, 1982. Id. at 515-16. The State in response stated that the police reports turned over to the defense did disclose that Glover identified Williams in a photo spread on June 30, 1982. The state appeared to concede that it had not turned over any document which disclosed either the Glover showup identifications or Clemons' tentative identification. Defense counsel complained that the State's failures prevented Williams from challenging those identifications at the suppression hearing, moved to exclude the testimony of both Glover and Clemons, and also moved for a

mistrial. The trial court, commenting that it had "never seen a defense case so definitively prepared" and that "there is genuinely very little that would take [defense counsel] by surprise," denied defense counsel's motions. Id. at 556-58. Defense counsel renewed their objection before Clemons testified about the lineup, but the trial court overruled the objection. Id. at 588.

In his petition, Williams now argues that the trial court erred in admitting Tucker, Glover and Clemons' identifications. As for Tucker's identifications, Williams first argues that even though those identifications were tainted by police misconduct, the trial court refused to let him introduce evidence of police misconduct at the suppression hearing. Petition ¶ 19, at 9. Williams failed, however, to raise this argument on his appeal to the Illinois Appellate Court.

See Appellant's Brief at 42-49; Appellant's Reply Brief at 23-34. Williams' failure means that this court cannot review this claim unless he can establish cause for the procedural default and prejudice attributable thereto. See, e.g., Murray v. Carrier, 106 S.Ct. 2639, 2644. No cause has been shown here, nor has Williams attempted to show such cause.

Williams also argues that the trial court should have suppressed the pre-trial identifications of Glover, Tucker and Clemons because each was made as a direct consequence of the fact that the police had arrested Williams without probable cause and therefore were able to display him to those witnesses. Citing United States v. Fisher, 702 F.2d 372, 379 (2nd Cir. 1983). In essence, Williams asks this court to reconsider the trial court and appellate court's interpretation of the fourth amendment -- a claim expressly

forbidden on collateral review by the Supreme Court in Stone v. Powell, 428 U.S. 465, 494-95 (1976) absent an argument that the petitioner was not provided an opportunity for full and fair litigation of his fourth amendment claim. Accord Sanders v. Israel, 717 F.2d 422, 423-24 (7th Cir. 1983), cert. denied, 465 U.S. 1033 (1984). Even though Williams claims he was unaware of Glover and Clemons' identifications at the time of the suppression hearing, he did receive a fair hearing on the question of whether probable cause existed to arrest him. Consequently, under Stone, this argument fails.

Furthermore, Williams maintains that the Glover showup identification and the Clemons' lineup identification both constituted violations of Williams' fifth and sixth amendment rights to counsel and that therefore those identifications should have been suppressed. But the fifth

amendment does not create a right to counsel at a pretrial identification because the constitutional privilege against compulsory self-incrimination is not implicated. Kirby v. Illinois, 406 U.S. 682, 687-88 (1972); Cf. United States ex rel. Espinoza v. Fairman, 813 F.2d 117, 120 (7th Cir. 1987) (the fifth amendment protects a defendant from interrogation without the presence of counsel), cert. denied, 107 S.Ct. 3240 (1987). Moreover, under the prevailing interpretation of Moran v. Burbine, 475 U.S. 412, 432 (1986), Williams' sixth amendment right to counsel had not yet attached at the time of the pretrial identifications in question because the state had not yet formally initiated adversary judicial proceedings against Williams.[1/] Fencl v. Abrahmson,

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1/ In United States ex rel. Hall v. Lane, 804 F.2d 79, 82 (7th Cir. 1986), cert. denied, 107 S.Ct. 1382 (1987), Judge Flaum implied that Moran did not

(continued...)

841 F.2d 760, 769 (7th Cir. 1988); United States ex rel. Shiflet v. Lane, 815 F.2d 457, 464-65 (7th Cir. 1987), cert. denied, 108 S.Ct. 1234 (1988). See generally Kirby, 406 U.S. at 687-91 (no right to counsel at a showing prior to "commencement of any prosecution").

Finally, Williams argues that the State's failure to disclose the Glover and Clemons' identifications effectively precluded him from challenging the procedures employed to obtain those pretrial identifications. The Constitution, however, does not mandate pretrial disclosure of identification testimony. See Brown v. Harris, 666 F.2d 782, 785 (2nd Cir. 1981), cert. denied, 456

1/ (...continued)
definitively resolve the question of whether a party may ever have a sixth amendment right prior to the initiation of formal adversary judicial proceedings. In light of Fencl and Shiflet, this court no longer considers Hall to be the prevailing view in this circuit.

U.S. 948 (1982). Williams of course had a right to question the fairness of the identification procedures, but his constitutional recourse under the circumstances was to cross-examine Clemons and Glover regarding the nature of identification procedures or to ask for a hearing outside the presence of the jury. See Watkins v. Sanders, 449 U.S. 341, 345-49 (1981); United States v. Mitchell, 540 F.2d 1163, 1166-67 (3rd Cir. 1976), cert. denied, 429 U.S. 1099 (1977). Since Williams does not challenge the fairness of the Glover and Clemons' identifications in his petition, the court does not address that question.

For the reasons given, the court grants the respondents' motion for summary judgment on Count II of Williams' petition.

II

Other Discovery Matters

In addition to the Glover and Clemons' identifications already discussed,

Williams complains that the State failed to disclose other discovery before trial. First, the police questioned Tucker's mother Rose at Area Four a few days before Tucker went to the station. Williams claims that the State should have produced a record or report of the questioning of Rose. Apparently, Williams believes that such a report would have revealed police harassment of Rose and that Tucker himself became aware of such harassment. But Williams failed to raise this argument on appeal in state court and has shown no cause for that failure. See Appellant's Brief at 50-55; Appellant's Reply Brief at 25-29. As a result, this court is precluded from addressing this claim.

Second, on November 30, 1982, an assistant state's attorney summoned Russell to his office at which time Russell disavowed the identification she had made earlier after being coerced by police.

Even assuming that Williams' mention of this fact in a footnote constitutes raising the issue with the Illinois Appellate Court,[2/] the court finds no constitutional infirmity resulting from the State's failure. The State did not introduce the coerced identification at trial, and Williams had adequate notice of Russell's recantation to include it in his motion to dismiss the indictment. See Petitioner's Exhibit 34.

In summary, the court finds no constitutional error resulted from the State's failure to turn over specified discovery. Consequently, the court grants the respondents' motion for summary judgment on Count VI.

2/ See Appellant's Brief at 51.

III

Restrictions During Voir Dire

Williams claims that the trial court unnecessarily restricted the questions which the jurors were asked during voir dire. The trial court refused to ask a number of proposed questions including questions about whether the jurors felt that the charge against Williams was evidence of guilt and about the jurors' attitude regarding the presumption of innocence. On collateral review this court's obligation is to insure that the accused received a fair trial before a panel of impartial jurors. E.g., Brinlee v. Crisp, 608 F.2d 839, 844 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980). But this court cannot make that determination without consideration of the questions the trial judge actually asked during voir dire, and those questions are not presently in the record. Consequently,

the court denies the respondents' motion for summary judgment on Count VII.

IV

Admission of Photographs

At trial the court admitted photographs of a large pool of blood at the tavern and of bullet holes in the victim's body. Williams claims that because no disputes existed relating to the cause of death or manner in which the wounds were inflicted, no possible relevance existed for their admission and they had an extremely prejudicial effect. The admission of the photographs is a matter within the discretion of the trial court whose ruling will not be disturbed on habeas review unless their admission rendered the trial fundamentally unfair. Osborne v. Wainwright, 720 F.2d 1237, 1238-39 (11th Cir. 1983); Batchelor v. Cupp, 693 F.2d 859, 865 (9th Cir. 1982), cert. denied, 463 U.S. 1212 (1983). To

make that determination, the court concludes it should review the photographs which are not yet part of the record. See Nettles v. Wainwright, 677 F.2d 410, 414-15 (5th Cir. 1982) (the habeas court examined the photographs before making a prejudice determination). The motion for summary judgment on Count IX is therefore denied.

V

Glover's Rebuttal Testimony

Prior to the trial, Williams moved in limine for an order precluding the State from eliciting testimony regarding a witness' fear of intimidation from the defendant or others. The State represented it would not elicit such testimony and the trial court ordered the State to give Williams and the court advance notice before asking questions in that area. At trial in the defense case, Emma Ginns denied having told Glover the day after the murder Williams had shot Love. Record

at 801-02. The State in its rebuttal case called Glover for purposes of impeaching Ginns. Glover testified that Ginns had told him that Williams was the gunman. When asked if Ginns had said anything about Williams' family, Glover responded as follows:

> She just said that she had been knowing them a very long time and that some of his sisters and she had went out together on occasions, but she was very familiar with the family and that she didn't want me to say that she had saw me because she was very afraid at the time.

Id. at 914. Williams moved for a mistrial or alternatively to have Glover's testimony stricken. The trial court denied this motion but granted Williams' request for an instruction striking Glover's last comment. Specifically, the trial court read the following instruction:

> Ladies and gentlemen of the jury, just

> before we broke Mr. Glover was testifying about a conversation he may have had with Emma on June 30th at 11:00 o'clock in the morning. Just before the break he made the statement that Emma said to him that she is very afraid. That particular testimony is irrelevant to the issues before the court and before the jury in this case. That particular testimony is inappropriate and, therefore, it is stricken by the court. The jury is instructed to disregard it, not to discuss it in chambers after the case is concluded because it is irrelevant and immaterial to the issues before the court.

Id. at 923.

Williams argues that the trial court erred in not granting his motion for mistrial and (implicitly) that the trial court's instruction did not remedy the State's breach of the court's ruling on Williams' motion in limine. The court

cannot agree. "Our theory of the trial relies upon the ability of a jury to follow instructions." Opper v. United States, 348 U.S. 84, 95 (1954). Absent special considerations such as a coerced confession, the presumption is that juries will follow instructions. Watkins v. Sowders, 449 U.S. 341, 347 (1981); United States v. Rivera, 778 F.2d 591, 599 (10th Cir. 1985), cert. denied, 106 S.Ct. 1384 (1986). Given the clarity of the trial court's instruction, the court concludes that Williams sixth amendment right to a fair trial was protected.[3/] The court therefore grants the respondents' motion for summary judgment on Count VIII.

[3/] Even if the trial judge had refused to strike Glover's statement, no habeas relief would be available to Williams unless admission of the testimony was arbitrary or fundamentally unfair. E.g., Colley v. Sumner, 784 F.2d 984, 990 (9th Cir. 1986), cert. denied, 107 S.Ct. 142 (1986). Since the trial court did strike Glover's statement, this court does not need to reach that question.

VI

State's Closing Argument

Williams argues that certain statements made by the State in its rebuttal during summation were improper and that those comments deprived him of his right to a fair trial. On collateral review, this court's consideration of the prosecutor's closing argument is limited to the inquiry of whether the prosecutor's statement "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 106 S.Ct. 2464, 2472 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). That determination requires consideration of the trial record as a whole, including whether the trial court instructed the jury to disregard the improper statements and the weight of the evidence against the petitioner. Darden, 106 S.Ct. at 2472-73; Shepard v. Lane, 818

F.2d 615, 621 (7th Cir. 1987), cert. denied, 108 S.Ct. 296 (1987).

Williams first argues that the prosecutor improperly vouched for the credibility of the lineup in which Tucker identified Williams. The court agrees that the prosecutor's comment that the lineup was one of the best the prosecutor had ever seen was improper. See Record at 1028. The trial court, however, also agreed, sustained an objection to the comment and instructed the jury that "the personal evaluations of the quality of the lineup are not relevant." Id. In light of the substantial evidence offered against Williams at trial and the trial court's quick remedy for the impropriety, the court finds that the comment did not deprive Williams of a fair trial.

Williams further objects to the prosecutor's reference to the "threatening" nature of a phone call Glover received the

date of the murder. Id. at 1030. But the trial judge sustained an objection to the contents of the call and instructed the jury accordingly. Id. at 1031. Even if the trial judge had not done so, the court would find the violation insufficient to establish the need for habeas relief.

Finally, Williams complains that the prosecutor in closing improperly inferred that the jury should consider Ginns' statement to Glover (that Williams was the gunman) for the truth rather than to impeach Ginns' trial testimony. Williams did not object to the prosecutor's characterization until after the jury had begun its deliberations. Id. at 1051. The trial court overruled his objection and denied his motion for a mistrial. Id. Although it is difficult to discern from the trial record, it appears that defense counsel chose to raise this objection the first moment after the jury had left the

courtroom. Unfortunately that moment came after the court had instructed the jury. In those instructions, the trial judge gave a general instruction regarding the use of a prior inconsistent statement to impeach a witness. Id. at 1045. That instruction failed to specify any particular statement, including Ginns'.

Viewing the record as a whole, the court concludes that the trial judge did not err in denying Williams' mistrial motion. While Williams' failure to make an immediate objection does not preclude him from seeking relief now, the court can consider it as a factor in determining the degree to which he was prejudiced. See High v. Kemp, 819 F.2d 988, 995 (11th Cir. 1987). In this regard, the fact that defense counsel failed to request a limiting instruction at the time Glover testified regarding the Ginns' statement is also instructive. See Record at 912-23.

Furthermore, as the court has already stated, the evidence convicting Williams was substantial. In this regard, the court agrees with the Illinois Appellate Court's characterization of the evidence:

> Andrew Tucker gave eyewitness testimony that, as he stood approximately six feet away, he saw the defendant murder Robert Love. His testimony was bolstered by the fact that he knew defendant prior to the commission of the crime. Isadore Glover identified defendant as the man with whom the victim had an argument the date of his death, which supplied the motive for the killing. Defendant does not point to any specific inconsistencies as casting doubt on the identification testimony.

Williams, 484 N.E.2d at 1199.

For these reasons, the court grants the respondents summary judgment on Count X.

VII

Police and Prosecutorial Misconduct

A. Williams' Theory of Defense

In his response to the respondents' motion for summary judgment, Williams characterizes the police investigation of Love's murder as one calculated to obtain Williams' conviction at any cost. Williams claims that the police targeted him as their sole suspect within hours of the shooting and created evidence which led to his arrest and conviction. According to Williams, the police misconduct included but was not limited to (1) three unauthorized entries into his home, (2) efforts to coerce a confession from him after his arrest, and (3) the imprisonment and harassment of Ginns, Russell and Beasley for twenty-four hours at Area Four headquarters during which time the police coerced identifications of Williams.

Williams first complains that the trial court foreclosed him from presenting his frame-up defense to the jury. But absent some proof that the police misconduct affected the testimony of the State's witnesses or prevented Williams from offering exculpatory evidence, the alleged police effort to "frame" him was not relevant to the question of whether Williams in fact had been the murderer. Although Williams cannot point to any place in the record where the trial court precluded him from offering exculpatory evidence, he does cite to portions of the record where the trial court rejected his plea to introduce evidence tending to undermine a witness' credibility.

B. Restrictions on Testimony Impacting a Witness' Bias or Motive

During the State's case in chief, defense counsel extensively cross-examined Tucker, Glover and Clemons. During

Tucker's cross-examination, defense counsel asked Tucker if at the time of his questioning at Area Four headquarters he had known that his mother Rose had been questioned at Area Four two days earlier. After Tucker responded that he had, defense counsel asked no further questions along that line. Aside from that one question, defense counsel failed to probe Tucker, Glover and Clemons on cross-examination for any possible effect of police misconduct on the veracity of their testimony. During Grady's cross-examination, the trial judge sustained hearsay objections each time defense counsel attempted to elicit testimony regarding Grady's possible fear of the police. The trial judge further refused to hear defense counsel's arguments at side bar that the testimony was not being offered for the truth of the matters contained in the hearsay statements. Record at 544-46.

Before the start of the defense case, defense counsel announced their intention to call as witnesses Detectives Rave and Cozzi, the officers who were involved in the early investigation and conducted the interrogations of Ginns, Russell and Beasley at Area Four. Defense counsel claimed that the evidence of the early stages of the investigation was relevant so that the jury could make a judgment of whether the identifications of Tucker, Glover and Clemons were reliable. Id. at 707. The trial judge responded that in his view evidence of police harassment of Ginns, Russell and Beasley would only be relevant if one of the three testified. Defense counsel then argued that Ginns and Russell's testimony about the interrogation procedures at Area Four was relevant to attack the identifications made by Tucker, Glover and Clemons at Area Four. Defense counsel further argued that if Tucker,

Glover and Clemons had in fact been intimidated that they would not admit it on the stand because of their fear. The trial court rejected those arguments and precluded inquiry in that area. Id. at 713-14.

Williams now claims that the trial judge's evidentiary ruling excluding evidence of the harassment of Ginns, Russell and Beasley which was intended to impeach Tucker, Glover and Clemons was error. Even if Williams argument is found to be meritorious, a mere finding that an evidentiary ruling was erroneous is an insufficient basis for granting habeas relief. The conviction stands unless the error "amounted to a fundamental defect so great that it inherently resulted in a complete miscarriage of justice." Cramer v. Fahner, 683 F.2d 1376, 1386 (7th Cir. 1982), cert. denied, 459 U.S. 1016 (1982); United States ex rel. Fuller v.

Attorney General of Illinois, 589 F. Supp. 206, 209 (N.D. Ill. 1984) (Aspen, J.), aff'd, 762 F.2d 1016 (7th Cir. 1985). This court need not reach that question, however, because it finds that the trial judge acted within his discretion by keeping the evidence out. Standing alone, evidence of improper police conduct relating to Ginns, Russell and Beasley is not sufficiently probative of possible police misconduct relating to Tucker, Glover and Clemons to overcome the highly prejudicial impact such evidence would have had in the case.[4/]

But as for the trial court's heavy-handed restrictions on Grady's cross-examination, this court does find that error occurred. Limitations on

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[4/] If there were some evidence in the record of police misconduct relating to Tucker, Glover or Clemons or that one of those three had heard of such misconduct, this court's ruling might have been different.

cross-examination are appropriate if the jury still has sufficient information from which to make a fair assessment of the witness's motives and bias. Clark v. O'Leary, No. 87-2801, slip op. at 2 (7th Cir. July 25, 1988) (cases cited therein). Williams claims that the trial court's restrictions on Grady's cross-examination possibly prevented Williams from showing Grady's fear of police harassment. The court agrees. Unlike in the cross-examinations of Tucker, Glover and Clemons, in Grady's cross-examination defense counsel appeared to be trying to make a concrete connection between evidence of police misconduct and the motive or bias of a witness. If the trial judge had given defense counsel the appropriate latitude on Grady's cross-examination, defense counsel might have exposed a fear which would have led the jury to question Grady's credibility as a witness.

But the trial court's error standing alone does not necessitate overturning Williams' conviction if this court finds that the constitutional error was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 106 S.Ct. 1431, 1436-37 (1986); Clark, slip op. at 15-17. Grady was not a crucial state witness. In fact, Grady's testimony did little other than impeach Ginns whose testimony was more thoroughly impeached by Glover. The court has already indicated that Tucker and Glover were the crucial State witnesses. In summary, the record generally reveals that Grady was an insignificant witness in an otherwise strong State case. As a result, the court finds that the trial court's error did not deprive Williams of a fair trial.[5/]

[5/] Williams also complains that the trial court unfairly refused to let defense counsel ask leading questions of Detective Cozzi when Williams called

(continued...)

C. Motion to Dismiss the Indictment

Finally, Williams argues that the police and prosecutorial misconduct was so egregious that the trial court should have dismissed the indictment. But dismissal of the indictment based on a fourth, fifth or sixth amendment violation is inappropriate "absent demonstrable prejudice, or substantial threat thereof." United States v. Morrison, 449 U.S. 361, 365-66 (1981). The court has already rejected most of Williams claims of prejudice and now rejects the remainder. Williams' speculative claim that the police misconduct "must" have affected State witnesses is not supported by the trial record. Moreover, Williams' conclusory statement that police misconduct crippled defense counsel's investigation is

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5/ (...continued)
Cozzi in the defense case. Williams fails, however, to explain why his inability to lead Cozzi impaired Williams' ability to show the motive or bias of any State witness, including Cozzi.

unconvincing absent some concrete connection between police misconduct and later-discovered exculpatory evidence. The same holds true for Williams' claim of prejudice resulting from the State's delay between arrest and preliminary hearing -- the claim of prejudice is conclusory and without support in the record.

Consequently, the court grants the respondents' motion for summary judgment on Counts I, III, IV, and V.

Conclusion

The court grants the respondents' motion for summary judgment on every count in the petition except Counts VII, IX and XI. The court will reserve ruling on Count XI until after reviewing the exhibits necessary for ruling on Counts VII and IX. The court further orders the respondents to file a second motion for summary judgment

addressing Counts VII, IX and XI with the necessary exhibits attached by September 15, 1988.

E N T E R:

Ann Claire Williams, Judge
United States District Court

Dated: August 19, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel., JAMES WILLIAMS, N-04055,	)	
Petitioner,	)	
v.	)	No. 87 C 5242
JAMES A. CHRANS, Warden of Pontiac Correctional Center, and NEIL F. HARTIGAN, Attorney General of the State of Illinois	)	
Respondents.	)	

MEMORANDUM OPINION AND ORDER

Background

On April 22, 1983, in the Circuit Court of Cook County, a jury found James Williams guilty of murder. He was sentenced to thirty years imprisonment. The Appellate Court of the First District of Illinois affirmed the verdict, People v. Williams, 137 Ill. App. 2d 736, 484 N.E.2d 1191 (1st Dist. 1985) and the Illinois

Supreme Court denied Mr. Williams' Petition for Leave to Appeal.

After exhausting all state remedies, Mr. Williams filed an eleven-count Petition for Writ of Habeas Corpus under 28 U.S.C. §§ 1331, 1343, 2241-2254. On August 24, 1988, this court granted summary judgment in the state's favor on eight of the eleven counts contained in the Petition. Ruling on the correctness of the verdict (count 11) was reserved until the state filed court-ordered exhibits for counts 7 (voir dire record) and 9 (autopsy and scene-of-crime photographs) and accompanying motions for summary judgment.

The court now grants summary judgment in favor of the state on counts 7 and 9. The court has also reconsidered its earlier ruling on count 4 (restricted cross-examination) and declines to change its earlier grant of summary judgment in

favor of the state. The court therefore grants summary judgment in favor of the state on count 11 of the Petition, and denies Mr. Williams the writ of habeas corpus.

I

Count 7 - Voir Dire Restriction

Mr. Williams asserts that the trial court's failure to specifically include approximately half of the thirty voir dire questions submitted by defense counsel unconstitutionally denied him of his right to a fair jury trial. The state asserts not only that Mr. Williams did receive a fair jury trial, but that summary judgment must be granted on count 7 because Mr. Williams procedurally defaulted by not raising his specific constitutional claim on direct appeal.

Mr. Williams never briefed voir dire arguments based on sixth and fourteenth amendment violations during his

state appeal. In that appeal, Mr. Williams relegated a constitutional claim to a footnote reference (Appellate Brief, pp. 64-65, n.). In his reply brief, he asked the court to address only state voir dire law. In his petition to the Illinois Supreme Court, Mr. Williams makes no argument at all regarding a federal dimension to his claim of restrictive voir dire, confining himself instead to citation of four federal cases and discussion of the state voir dire statute (pp. 45-47). The scope of the state voir dire statute, Illinois Supreme Court Rule 234, Ill. Rev. Stat. ch. 110A, ¶ 234, was expanded following the decision in People v. Zehr, 103 Ill. 2d 472, 469 N.E.2d 1062, 1064 (1984). Zehr held that voir dire questions regarding presumption of innocence, guilt beyond a reasonable doubt, and attitudes toward a defendant who does not testify on his own behalf, although formerly not allowed

because of Rule 234's restriction on questions concerning matters of law or instructions, must be allowed. Zehr, 469 N.E.2d at 1064. Defense questions about such issues were excluded by the trial court in Mr. Williams' trial. The Zehr decision, however, came after Mr. Williams' 1983 trial and may only be given prospective application. People v. Britz, 112 Ill. 2d 314, 318-319, 493 N.E.2d 575, 577 (1986). The Zehr rule, therefore, does not apply to Mr. Williams.

Even though Mr. Williams does cite to several federal court decisions, following a "see" signal, he fails to specifically articulate a sixth or fourteenth amendment violation in his state appeal. In a recent case, the Seventh Circuit held that a petitioner must do considerably more in order to preserve a constitutional issue for federal habeas review:

> The only reference to a constitutional violation was a "see also" reference to some Supreme Court cases and was plainly insufficient to alert the Illinois appellate court to consider any federal constitutional error. Consequently, that court decided the matter on state statute and Illinois case law and the issue is therefore foreclosed here.

Washington v. Lane, 840 F.2d 443, 445 (7th Cir. 1988). Mr. Williams' voir dire claim is similarly foreclosed.

It is settled law in Illinois that the failure to present a constitutional claim on direct appeal operates as a procedural default and hence a waiver of that claim. United States ex rel. Duncan v. O'Leary, 806 F.2d 1307, 1313 (7th Cir. 1986). A state prisoner who has so defaulted may not obtain federal habeas relief absent a showing of cause and actual prejudice. Id. Mr. Williams does not meet

this burden. Although the general group voir dire is part of the record (R. 460-48-1), the four-person panel venires were conducted outside the presence of a court reporter. (R. 480.). With no record to the contrary, the Illinois Appellate Court's finding that the trial court was within its proper discretion in restricting voir dire will be presumed to be correct. 28 U.S.C. § 2254(d). See Williams, 484 N.E.2d at 1198.

Mr. Williams has procedurally defaulted by failing to present his constitutional claims to the Illinois courts. Nutall v. Greer, 764 F.2d 462, 464 (7th Cir. 1985). "State courts must have a fair opportunity to consider constitutional objections to state criminal convictions before a federal court assumes the intrusive power to nullify those convictions on constitutional grounds." Id. at 463. Since Mr. Williams fails to show cause and

prejudice for this procedural default, Duncan v. O'Leary, 806 F.2d at 1313, the state is entitled to summary judgment on count 7.

II

Count 9 - Admissibility of Photographs

Mr. Williams contends that the admission of three photographs depicting (1) a pool of blood on the floor of Brian's bar, (2) an autopsy close-up of two bullet chest wounds, and (3) an autopsy close-up of a bullet neck wound and sutures were all irrelevant, highly inflammatory, and prejudicial. The state asserts that the photographs are relevant since they corroborate testimony of the state's witnesses regarding factual details of the homicide.

Habeas relief will be granted for an evidentiary error only if the evidence was crucial, critical, and highly significant in the case. Jameson v. Wainwright, 719 F.2d 1125, 1127 (11th Cir. 1983). If

illustrative of testimony given by witnesses and of probative value, the admission of gruesome photographs will not violate the constitutional rights of a defendant nor prevent him from receiving a full and fair trial. Harding v. Lewis, 641 F. Supp. 979, 996 (D. Ariz. 1986). Generally, federal courts will not review a state trial court's decisions in admitting evidence. Nettles v. Wainwright, 677 F.2d 410, 414 (5th Cir. 1982). A federal court will only assess whether the magnitude of any possible prejudicial impact of gruesome photographs affected the fundamental fairness of a criminal trial. Id. at 414-15. The photos in Mr. Williams' trial were neither unnecessarily inflammatory nor materially significant to the outcome of the verdict. They did not affect the fundamental fairness of his trial, so the state is entitled to summary judgment.

III

Count 4 - Cross-Examination Restriction

Mr. Williams contends that restrictions of his sixth amendment right to confront police witnesses prevented an effective defense and hindered impeachment on the issue of police misconduct. The state asserts that Mr. Williams failed to use available opportunities to develop his defense theory.

Central to the right of confrontation is the "guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses." Berger v. California, 393 U.S. 314, 315 (1969). The Supreme Court has indicated that this right is subject to discretionary parameters:

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among

> other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (emphasis in original). In Mr. Williams' case, the trial court indicated that since the allegedly police-abused witnesses were not called to the stand to testify, and since defendant identification was obtained through an independent source, it would unnecessarily confuse the jury to allow cross-examination on non-material issues.

When a trial judge restricts cross-examination, it is necessary to

ascertain whether there were alternative means available to the defense to impeach witnesses. United States ex rel. Blackwell v. Franzen, 688 F.2d 496, 501 (7th Cir. 1982). See also U.S. v. Cameron, 814 F.2d 403, 406 (7th Cir. 1987): "We must resolve whether the restrictions that the court imposed on the defendant's cross-examination deprived the defense of a meaningful opportunity to elicit available, relevant information that was likely to effectively impeach the credibility of the witnesses." Mr. Williams had a "meaningful opportunity" to "effectively impeach the credibility of the witnesses." Id. Defense counsel failed to cross-examine the state's occurrence witnesses in a manner that would bring to light the effect of police misconduct on the truthfulness of their testimony. Moreover, Mr. Williams did not use the opportunity to call to the stand witnesses who were allegedly abused

by the police. Had Mr. Williams laid the proper foundation for this testimony by calling police-abused witnesses to the stand, he would have had the opportunity to impeach the state police witnesses. Since Mr. Williams failed to use the opportunities available to him to develop his defense theory, the court declines to change its earlier ruling granting summary judgment to the state on Count 4.

IV

Count 11 - Correctness of Verdict

The state court's explicit and implicit factual findings are fairly supported in the record. The scope of voir dire lies within the discretion of the trial judge and, absent a showing of cause and prejudice for failure to argue constitutional claims to the state court, this court must assume that there was no abuse of discretion. Additionally, because the photographs were neither unnecessarily

inflammatory nor material to the outcome of the verdict, they were constitutionally admissible at trial. Finally, the motion to alter the earlier ruling on count 4 is denied because Mr. Williams did not seize available sixth amendment confrontation opportunities. Accordingly, the petition for writ of habeas corpus is denied.

E N T E R:

Ann Claire Williams, Judge
United States District Court

Dated: June 29, 1989

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES WILLIAMS, Defendant-Appellant.

First District (1st Division) No. 83-1619

Judgment affirmed.

Opinion filed October 21, 1985.

JUSTICE CAMPBELL delivered the opinion of the court:[6/]

After a jury trial, defendant, James Williams, was found guilty of murder and sentenced to 30 years' imprisonment. Defendant appeals, contending that (1) the trial court erred in denying defendant's motion to dismiss; (2) evidence of police conduct should have been presented to the jury; (3) the pretrial identifications of defendant should have been suppressed since he was arrested without probable cause;

[6/] Justice McGloon heard the oral argument in this case, and following his retirement, Judge Buckley was substituted, listened to the tapes of the oral argument and read the briefs and record, and concurs in the opinion.

(4) he was unfairly surprised and prejudiced by the disclosure of the pretrial identifications; (5) improper evidentiary rulings by the trial court require reversal; (6) he was prejudiced by the comments of the prosecutors during the course of the trial; and (7) he was not proved guilty beyond a reasonable doubt.

On June 29, 1982, at approximately 7 p.m., the victim, Robert Love, was shot and killed in Brian's Lounge, a tavern located in Chicago. At the time of the shooting, there were approximately 20 people in the tavern, including a number of regular patrons.

At trial, Isadore Glover, the brother of the victim testified that on the afternoon of the day of the incident he and his brother were sitting on the front porch of their house. The defendant, known to Glover as "Bill," approached the porch and began arguing with the victim concerning a

$10 debt the defendant owed the victim. The defendant was with a second man who was carrying a folding chair. The defendant punched the victim in the right side of his face and defendant reached for the folding chair. Glover, who was on crutches at the time, tossed his brother a crutch. At that point the defendant ran down the street, saying, "I will see you later." Glover and his brother returned to the porch, where they sat for about 45 minutes. The victim then left for Brian's Lounge. Glover stated that later that day he received a phone call he interpreted to be a threat on his brother's life.

Glover further testified that the morning following the shooting he had a conversation with a woman named "Pussycat," who stated that she was present at the time of the shooting and that the person who shot Robert Love was the defendant. The defendant was also known to her as "Bill."

"Pussycat" further told Glover that she was familiar with defendant's family and because she was afraid she did not want Glover to reveal their conversation. Following this conversation, Glover met with the police and identified a photograph of defendant as the man who had been arguing with his brother. At a later date, Glover made an in-person identification of defendant as the man who had been arguing with his brother.

Emma Ginns testified that her nickname was "Pussycat" and that she had been at Brian's Lounge at the time of the incident and that she had a conversation with Isadore Glover the following morning. She stated that she told Glover that his brother had been shot but denied telling Glover that "Bill" had shot his brother.

Charles Clemons testified that he had been a regular at the tavern and was present on the day of the incident. He

participated in a card game at the tavern and noted that the victim was getting ready to sit down at the card game. When the gunfire began, Clemons dropped to the floor. When he stood up, the gunman left and the victim was lying on the floor. He further testified that he viewed a lineup that consisted of five people. On the day of the lineup he could not positively identify the defendant as the killer but stated in court that the defendant was one of the people in the lineup.

Andrew Tucker testified that he was also at the bar on the day of the incident. He stated that upon arriving he entered a card game with Charles Clemons and others. The victim was standing behind the table awaiting his turn to sit down at the card game. Tucker was about to leave the table and had just bent over at the waist to pick his jacket up off the floor. While bent over he heard a shot. Before he

could stand up, Tucker was grabbed around the neck from behind by the victim. As he tried to stand up he was brought face to face with the gunman who stood approximately six to eight feet away. As Tucker struggled to get loose from the grasp of the victim, several more shots were fired. As the victim's hold on Tucker weakened, Tucker fell face first to the floor. Tucker remained face down on the floor until the shooting stopped and then he ran out of the bar. Tucker identified defendant in police photos as well as in a lineup as the gunman. He further testified that he had attended grammar school with defendant and, as a result, he recognized defendant at the time of the shooting.

Prior to trial, a hearing was held on defendant's motion to quash the arrest and suppress the identifications of defendant. At the hearing, Margaret Russell, Emma Ginns and Carl Beasley,

regulars who had been in the tavern at the time of the shooting, testified. Ginns and Russell stated that they were questioned and intimidated by the police and that they were released only upon identifying defendant as the perpetrator. Ginns and Russell asserted that the police withheld bathroom and telephone privileges from them, they refused to feed them and they physically threatened them. In addition, Russell testified that she heard Carl Beasley "getting whipped" and Ginns stated that she saw a police officer kick Beasley in the groin area. Beasley testified that he was questioned by the police for a 24-hour period and that he denied seeing anyone shoot Robert Love.

1. Initially, defendant contends that the trial court erred in denying his motion to dismiss the information. Defendant's motion alleged that misconduct by both the police and the prosecutor

denied him a fair trial. Defendant contends that the police coerced Margaret Russell, Emma Ginns and Carl Beasley into positively identifying the defendant after imprisoning and torturing witnesses over a two-day period. Further, defendant argues that the police mistreatment suffered by these three witnesses subsequently influenced other witnesses to testify for the State.

A trial court had the authority to dismiss an information upon statutory grounds or a clear denial of due process. (Ill. Rev. Stat. 1983, ch. 38, par. 114-1; People v. Lawson (1977), 67 Ill. 2d 449, 367 N.E.2d 1244; People v. Rivera (1979), 72 Ill. App. 3d 1027, 390 N.E.2d 1259.) In Rivera, two witnesses alleged that police officers coerced them into testifying against the accused at a grand jury hearing. The court was fully aware of the accused's claim since the allegations of

police misconduct were made at a hearing to quash the arrest and suppress the identification of the accused. The coercion was denied by the police officers. The court held that the accused failed to establish the due process violation with certainty and refused to dismiss the indictment. 72 Ill. App. 3d 1027, 1038, 390 N.E.2d 1259.

Similarly, in the instant case, the allegations of police misconduct were made at the hearing on defendant's motion to quash the arrest and suppress the identification of the defendant. The alleged coercion was completely denied by the police officers. The trial court heard the witness' testimony and denied the motion due to insufficient grounds to support and authenticate defendant's allegations. We find that there was no abuse of discretion on the part of the trial court since any due process violation

was not established with certainty. People v. Rivera (1970), 72 Ill. App. 3d 1027, 390 N.E.2d 1259.

2. Defendant further claims that the State delayed in granting a preliminary hearing to defendant for a period of 21 days in order to create a case against him. A preliminary hearing should be performed with reasonable promptness as determined by the facts and circumstances of the case. (People v. Jackson (1961), 23 Ill. 2d 274, 178 N.E.2d 299.) The defendant here was arrested on July 1, 1982, and a preliminary hearing was scheduled for July 6, 1982. On the State's motion the hearing was twice continued until July 21, 1982. The record does not indicate that defendant at any time objected to the continuances. We do not find the delay so unreasonable as to constitute error especially where defendant claimed no prejudice.

3. Defendant next contends that the trial court erred by excluding evidence of police misconduct at trial. Defendant argues that his rights were violated when the trial court precluded him from presenting evidence of police intimidation of Russell, Ginns and Beasley which resulted in their identifications of defendant. Defendant further contends that the identifications made by Andrew Tucker and Isadore Glover and the testimony of Charles Clemons were the result of the police coercion of Ginns, Russell and Beasley. The trial court excluded the evidence of police misconduct since the identifications of defendant made by Ginns and Russell were not going to be introduced by the State at trial. The court stated that there appeared to be an independent basis as to what Beasley saw in the tavern at the time of the shooting. Beasley did not testify to any violence by the police nor did he

make a positive identification of defendant.

The relevancy standard is used in determining the admissibility of evidence. (In re Application of County Treasurer (1973), 14 Ill. App. 3d 765, 303 N.E.2d 476.) The test for relevance is whether the evidence offered tends to prove or disprove a disputed issue. (People v. Fair (1977), 45 Ill. App. 3d 301, 359 N.E.2d 848.) The general rule is that the evidence must be confined to the point in issue. People v. Wilson (1948), 400 Ill. 603, 81 N.E.2d 445.

The issue in the case at bar was the reliability of the identification testimony of the witnesses. The State did not call either Emma Ginns or Margaret Russell as witnesses and their identification testimony never came before the jury. Defendant contends that because Ginns and Russell complained of police coercion, it

is likely that Andrew Tucker and Isadore Glover were coerced by the police into identifying defendant as the killer. However, neither Tucker nor Glover complained of police mistreatment. Moreover, defense counsel never cross-examined Tucker or Glover as to whether they had been intimidated by the police. Under these circumstances, we believe the trial court was within its discretion in excluding any evidence of police misconduct at trial.

4. Defendant further contends that Isadore Glover's and Charles Clemons' pretrial identification of defendant should have been suppressed because he was arrested without probable cause. At the suppression hearing in the instant case, Detective McCarthy, one of the arresting officers, testified that eyewitnesses to the shooting related to him that the gunman uttered, "I told you so," before shooting the victim with five bullets. Isadore

Glover had given a statement to the police that on the afternoon of the shooting he witnessed a fight between the victim and a man known as "Bill." During the course of the argument, "Bill" shouted words to the effect that he would be back to get the victim. Following the shooting, Glover identified a photograph of the defendant as "Bill," the man who had fought with the victim.

Probable cause to arrest exists where the facts and circumstances known to the arresting officer are sufficient to warrant a man of reasonable caution in believing that an offense has been committed and that the person arrested has committed the offense. (People v. Reynolds (1983), 94 Ill. 2d 160, 445 N.E.2d 766.) Evidence sufficient to convict is not required to support a finding of probable cause. (People v. Lippert (1982), 89 Ill. 2d 171, 432 N.E.2d 605.) On review, the

trial court's finding of probable cause will not be disturbed unless manifestly erroneous. (People v. Borges (1980), 88 Ill. App. 3d 912, 410 N.E.2d 1076.) It is our opinion that Isadore Glover's identification of defendant as the man with whom the victim had a previous altercation provided the sufficient probable cause to arrest defendant.

5. Defendant also argues that the pretrial identifications by Isadore Glover and Charles Clemons should have been suppressed because he was not represented by counsel. The right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against defendant whether by way of formal charge, preliminary hearing or arraignment. (Kirby v. Illinois (1972), 406 U.S. 682, 32 L. Ed. 2d 411, 92 S. Ct. 1877; People v. Burbank (1972), 53 Ill. 2d 261, 291 N.E.2d 161.) Here, at the time of the identifica-

tions, no adversarial proceedings had been initiated against defendant. The police case was at the investigatory stage at the time of the lineup. Thus, defendant's right to counsel had not yet attached.

6. Defendant urges that he was unfairly surprised and prejudiced by the disclosure of the pretrial identifications of defendant by Charles Clemons and Isadore Glover and that a mistrial should have been granted. The trial court stated that it did not believe that the defendant was caught by surprise due to the extensive amount of discovery conducted by defense counsel.

The trial court has discretion in allowing the introduction of testimony not disclosed where there is no showing of surprise or prejudice. (People v. Ferguson (1981), 102 Ill. App. 3d 702, 429 N.E.2d 1321.) A reviewing court will not reverse the trial court's exercise of discretion in

the absence of a showing of surprise or prejudice to defendant. People v. Winfield (1983), 113 Ill. App. 3d 818, 447 N.E.2d 1029.

Prior to trial, the public defender, who initially represented defendant in the instant case, filed a motion for discovery requesting a list of witnesses that the State would call. The State's answer to the motion included the name and address of Isadore Glover. Later, subsequent counsel was appointed and was advised that all discovery had been turned over to defendant. Further, defendant's discovery included the police report which referred to Charles Clemons' unsuccessful attempt to identify defendant at a lineup. Under these facts, it cannot be said that defendant was unfairly surprised or prejudiced by the identifications of defendant by Clemons or Glover.

7. Defendant next contends that improper evidentiary rulings by the trial court require reversal. Prior to trial, defendant filed a motion in limine to prohibit the State from making any reference to defendant's prior conviction for voluntary manslaughter. The court ruled that reference to the previous offense of voluntary manslaughter was too similar to the murder charge defendant was presently charged with and would prejudice the defendant. (People v. Montgomery (1971), 47 Ill. 2d 510, 268 N.E.2d 695.) The court, therefore, limited the State's reference to the prior conviction only as a "prior felony conviction."

A defendant's previous conviction can be disclosed at his trial for impeachment purposes if it is within 10 years following his conviction, unless the court determines that the probative value of the impeachment is outweighed by prejudice to

defendant. (People v. Axelson (1976), 37 Ill. App. 3d 566, 346 N.E.2d 24.) In the case at bar, by its ruling limiting reference to the prior conviction only as a "prior felony conviction," the trial court clearly had weighed the probative value of the use of the conviction against the prejudicial impact to defendant. The trial court recognized the danger that the jury could view the voluntary manslaughter conviction as propensity evidence since the charge in the instant case was murder and, by its instructions, the court avoided any prejudice to defendant.

8. Defendant also contends that the court should have granted a mistrial following testimony by Isadore Glover that Emma Ginns had told him that she afraid to identify defendant as the murderer. Emma Ginns testified for the defense and denied seeing the shooting. On cross-examination by the State she admitted being present in

the tavern at the time of the shooting but denied having a conversation with Glover relating to the shooting. On rebuttal, the State called Isadore Glover and questioned him as to whether Ginns told him anything about defendant's family. He responded that "she was very familiar with the family and she didn't want me to say that she had saw me because she was very afraid at the time." The defendant then moved for a mistrial, alleging that the State had violated an agreement that they would not elicit testimony about witnesses fearing for their safety. The court ruled that the major portion of the testimony constituted impeachment of Ginns and ordered the remark regarding the witness' fear to be stricken and instructed the jury to ignore the statement.

The decision of whether or not to grant a mistrial is within the broad discretion of the trial court. (People v.

Watson (1982), 103 Ill. App. 3d 992, 431 N.E.2d 1350.) That decision will not be disturbed on review unless the defendant establishes that he was prejudiced both by the comment complained of any by the denial of his motion for a mistrial. (People v. Omatto (1980), 88 Ill. App. 3d 438, 410 N.E. 588.) Any prejudice in the presentation of such testimony is generally cured by sustaining an objection thereto and instructing the jury to disregard. (People v. Burnett (1979), 74 Ill. App. 3d 990, 394 N.E.2d 456.) The purpose of the rebuttal testimony of Isadore Glover in the case at bar was to impeach Emma Ginns' prior testimony that she did not know who had shot and killed Robert Love and that she denied telling Glover that she saw defendant commit the murder. We find this was proper impeachment of Ginns' testimony. Moreover, any error was harmless in light of the admonition and instructions by the

trial court. People v. Burnett (1979), 74 Ill. App. 3d 990, 394 N.E.2d 456; People v. Gant (1974), 58 Ill. 2d 178, 317 N.E.2d 564.

9. Defendant further argues that the trial court abused its discretion in admitting into evidence inflammatory photographs of the victim's body. We find no merit in this argument. Photographs, including gruesome photographs, are properly admitted where they are relevant to establish any fact at issue, even where defendant does not refute the victim's identity or his cause of death. (People v. Kubat (1983), 94 Ill. 2d 437, 447 N.E.2d 247, cert. denied (1983), 464 U.S. 865, 78 L. Ed. 2d 174, 104 S. Ct. 199.) Photographs may be properly admitted to corroborate testimony despite defendant's offer to stipulate as to matters shown by the photographs. (People v. Nicholls (1969), 42 Ill. 2d 91, 245 N.E.2d 771.) Further,

the admission of photographs is a matter within the sound discretion of the trial court. (People v. Stocks (1981), 93 Ill. App. 3d 439, 417 N.E.2d 1080.) The photographs of the victim were properly admitted into evidence here, since they corroborated testimony as to the cause of death, the number and location of wounds and the manner in which they were inflicted.

10. We also find no merit in defendant's contention that he was denied his right to learn potential prejudices of jurors when the trial court refused to ask on voir dire 30 questions which he submitted to the court. The trial court excluded 19 of the questions ruling that they were too time-consuming, too broad, concerned matters of law, or were improper since they called for the subjective feelings of the jurors. Excluded questions concerned the jurors' attitudes regarding the State's burden of proof, the presump-

tion of innocence, police brutality, prior jury service, the use of alcohol as well as the jurors' educational and military background and whether they had moved from a changing neighborhood. It is our opinion that the court's ruling was within its broad discretion in determining the scope of voir dire. People v. Barnes (1982), 107 Ill. App. 3d 262, 437 N.E.2d 848; People v. Phillips (1981), 99 Ill. App. 3d 362, 425 N.E.2d 1040.

11. We consider next defendant's contention that he was prejudiced by the comments of the prosecutor during the course of the trial. Defendant argues that it was improper for the prosecutor in his closing argument to vouch for the credibility of Andrew Tucker, the principal identification witness. The prosecutor stated:

> "Now in terms of Mr. Tucker, he is obviously an important witness, he saw a

> lineup. Now this is one of the best line-ups I have ever seen. It takes place in Cook County Jail where they obviously have a lot of people to choose from. I have seen lineups where there are only people, young people, tall people and short. . . ."

The State maintains that these comments constituted a legitimate reply to defense counsel's statement in his closing argument that Tucker was pressured by the police to identify defendant as the murderer. We agree. We do not view the comments of the prosecutor as bolstering the credibility of Andrew Tucker. The statement focuses attention on the nature of the lineup rather than the witness who viewed it. Further, we believe the comment indicated the nonsuggestive nature of the lineup and was an appropriate response to defendant's argument that Tucker's identification was the result of police coercion. People v. Carbona (1975), 27 Ill. App. 3d 988,

327 N.E.2d 546, cert. denied (1976), 424 U.S. 914, 47 L. Ed. 2d 319, 96 S. Ct. 1113; People v. Halteman (1956), 10 Ill. 2d 74, 139 N.E.2d 286.

12. Defendant further complains that he was prejudiced when the prosecutor referred to the telephone call received by Isadore Glover, following the death of the victim, as a "threatening" phone call. Defendant's objection to the remark was sustained. In an earlier ruling, the court ordered the content of this telephone conversation to be stricken from the record, but allowed the fact that a call was received by Glover to stand. Since the objection by defense counsel was sustained, the remark was stricken from the record, and the jury was instructed to disregard the comment, we find no error resulted. People v. Hardy (1979), 77 Ill. App. 3d 37, 395 N.E.2d 743.

Finally, defendant contends that the evidence presented at trial was unreliable and raised a serious doubt of guilt. It is well established that it is the function of the trier of fact to determine the credibility of the witnesses, the weight to be given their testimony and the inferences to be drawn from the evidence. (People v. Akis (1976), 63 Ill. 2d 296, 347 N.E.2d 733.) A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or contrary to the verdict as to raise a reasonable doubt of guilt. (People v. Yarbrough (1977), 67 Ill. 2d 222, 367 N.E.2d 666.) We view the evidence presented in the instant case as compelling. Andrew Tucker gave eyewitness testimony that, as he stood approximately six feet away, he saw the defendant murder Robert Love. His testimony was bolstered by the fact that he knew defendant prior to the commission of the

crime. Isadore Glover identified defendant as the man with whom the victim had an argument the day of his death, which supplied the motive for the killing. Defendant does not point to any specific inconsistencies as casting doubt on the identification testimony.

For the foregoing reasons, the judgment of the trial court is affirmed.

Judgment affirmed.

BUCKLEY, P.J., and O'CONNOR, J., concur.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued June 12, 1990

June 20, 1990

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

JAMES WILLIAMS, Petitioner- Appellant	) Appeal from the) United States) District) Court for the) Northern) District of) Illinois,) Eastern) Division.
No. 89-2589 v.	)
HOWARD A. PETERS III, Warden, Pontiac Correctional Center, et al., Respondents- Appellees.	) No. 87 C 5242) Ann Claire) Williams,) Judge.

Order

The principal question on this appeal is whether constitutional error occurred at Williams' trial for murder when the state judge blocked his lawyer's effort

to show that the police tried to coerce three witnesses into identifying Williams as the killer. None of these three testified, but Williams insisted that he was entitled to show that the police abused these three in order to establish the circumstances influencing the testimonial witness's decision to give evidence against him. The exclusion of the evidence, he submits, violated both the due process clause of the fourteenth amendment and the compulsory process clause of the sixth amendment, applied to the states by the fourteenth.

The district judge carefully considered these and related arguments in two extensive opinions, 1988 U.S. Dist. Lexis 9478 (N.D. Ill.), 1989 U.S. Dist. Lexis 7731 (N.D. Ill.). She concluded that except with respect to one witness, counsel had not attempted to lay the necessary foundation. The district judge believed

that the Constitution allows the state court to exclude such evidence, on the ground that it would tend to distract the jury from the main issue at trial, unless the defense shows that the eyewitnesses heard of the mistreatment of the other persons. Unless they had knowledge, the judge reasoned, their testimony inculpating Williams could not have been affected.

It is unnecessary to rehash the district court's analysis of this case, with which we substantially agree. We, like the district judge, are greatly concerned by evidence that the police mistreated potential witnesses; still, the state court's exclusion of that evidence generally did not violate the Constitution. Although, as the district court held, curtailing the inquiry of witness Grady violated the Constitution, Grady was a peripheral witness, and the limitation was harmless beyond a reasonable doubt.

Accordingly, the judgment of the district court is

AFFIRMED.

No. 90-497

In The

Supreme Court of the United States

October Term, 1990

JAMES WILLIAMS,

Petitioner,

-vs-

JAMES A. CHRANS, Warden of Pontiac Correctional Center and NEIL F. HARTIGAN, Attorney General of the State of Illinois,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals, Seventh Circuit

BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROBERT J. RUIZ
Solicitor General
State of Illinois

TERENCE M. MADSEN*

RICHARD S. LONDON
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5029

Counsel for Respondents

*Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should deny the writ where the Court of Appeals found that the trial court properly exercised its discretion in evidentiary rulings and where even if error had occurred, habeas relief is prohibited.

II. Whether petitioner has failed to present a substantial federal question for review where the factual basis of his question does not exist in this case and where even if the conduct petitioner claims had occurred, the result would not have changed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

No. 90-497

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BRIEF IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as treated more fully by the argument contained herein, respondent does not believe petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the writ.

STATEMENT OF THE CASE

A. Trial Testimony

Isadore Glover, the victim's brother, testified that at about 3:00 p.m. on the day of the murder he witnessed an argument between the victim and Williams, whom Glover identified in court. Apparently, Williams owed the victim ten dollars. The intensity of the argument increased to the point where Williams punched the victim in the head. When the victim went after Williams with a crutch, Williams ran from the victim and said "I will see you later." Forty-five minutes later, the victim left for Brian's Lounge, a west-side tavern. Thirty minutes after the victim left, Glover left to join him at the tavern. After talking with his brother, Glover returned home. Glover was later called back to the bar, where he saw his brother lying in a pool of blood. Glover testified that later he identified Williams in a photo spread as the man who had argued and fought with the victim at 3:30 p.m. on the date of the murder. (*United States ex rel. Williams v. Chrans*, No. 87 C 5242 at 2)

Lee Grady testified that he was in the tavern at the time of the shooting but could not see the assailant's face. During the cross-examination of Grady, the trial court sustained hearsay objections to defense counsel's questions regarding statements made by a "Mr. Beasley" to Grady on July 7, 1982. 545-46. *Id.*

Charles Clemons was a regular at the tavern and was present at the time of the shooting. Clemons testified that the victim was shot as the victim moved to take a seat at the card table. Clemons saw a man holding a gun with both hands before Clemons fell to the floor to avoid

further gunfire. Clemons further testified that two days after the shooting, on July 1, 1982, he viewed a lineup of five men, one of whom was Williams. At the time of the lineup, Clemons told an officer that Williams "looked something like the man that [Clemons] caught a glimpse of but [Clemons] wasn't sure." *Id.* at 589. Clemons then told the officer that the gunman had worn a cap. But even after the officer put a cap on Williams, Clemons "wasn't one hundred percent sure" so he could not make a positive identification. *Id.* at 3.

Andrew Tucker testified that he was Clemons' card partner the night of the shooting. Tucker had gotten up from the table and was bending over to pick up his coat when he heard the first shot. Tucker then tried to stand up but could not because the victim, who had been behind Tucker, grabbed Tucker around the neck. Tucker turned to face the gunman who was standing six to eight feet away. The gunman fired another shot, the victim's grip weakened and Tucker dove to the side. Tucker identified Williams in court as the gunman and testified that he recognized Williams from the three years the two spent together in grammar school. Tucker further testified that he identified Williams in a photo spread on July 6, 1982 and in á lineup on July 13, 1982. *Id.*

The State offered evidence to corroborate Glover, Tucker and Clemons' testimony. Detective Edward Rave of the Chicago Police Department testified that on June 30, 1982 Glover had made an identification of Williams from a photo spread. Detective Rave also testified that on July 13, 1982 Tucker identified Williams in a five-man lineup. Detective Robert Cozzi testified that on July 6, 1982 Tucker identified Williams in a photo spread.

Finally, Detective Michael O'Sullivan testified that Clemons at the time of the lineup told him that Williams "resembled" the gunman but that Clemons could not be sure. *Id.* at 4.

Williams did not testify in the defense case, but a number of others did.

Emma "Pussycat" Ginns testified that she had been in the tavern at the time of the murder, but that she had not seen Williams in the tavern at all that day. On cross-examination Ginns admitted talking to Glover the day after the murder but denied having told Glover that Williams was the one who had shot Robert Love. *Id.* at 5.

Williams' wife Jacqueline testified first about a police search of the Williams' apartment at approximately 8:00 p.m. the day after the murder. After hearing a knock on the door she opened the door and found three police officers standing with their guns drawn. Without permission to enter or a search warrant, the officers walked past her, asked if her husband was at home and searched the apartment for about five minutes. Jacqueline later told Williams what had happened after he returned to the apartment. Jacqueline further testified that the next morning at approximately 6:00 a.m. the police returned. After opening the door, Jacqueline told the police her husband was in bed. The police again walked past her and into the bedroom where they arrested Williams.

Williams also called Detective Cozzi back to testify in the defense case. The trial court rejected defense counsel's request to conduct an adverse examination of Detective Cozzi, so objections to leading questions were sustained. Detective Cozzi essentially testified that he

had interviewed a number of people at the tavern the night of the murder and from those interviews had obtained a composite description of the gunman. But as of the night of the murder, Detective Cozzi did not have a suspect in mind. *Id.*

In rebuttal, the State called two witnesses to impeach Ginns. Glover testified that the day after the crime Ginns had told him that Williams was the murderer. Grady testified that the night of the murder Ginns had told him that she had seen and recognized the murderer. *Id.* at 6.

B. Motion to Quash and Suppress

Prior to trial, Williams made a motion to quash his arrest and suppress identifications made subsequent to his arrest, including any pretrial or trial identifications of Williams made by Ginns, Tucker, Margaret Russell and Carl Beasley. On January 31 and February 2, 1983, the trial court held a suppression hearing on that motion. When called in support of the motion, defendant and his wife Jacqueline testified that he was subjected to a warrantless arrest at gunpoint in his apartment during the early morning hours of July 1, 1982. (R. 108, 215) According to defense testimony, Williams was not given *Miranda v. Arizona*, 384 U.S. 436 (1966) warnings at that time. (R. 108) Defendant claimed he was taken to police headquarters where he was interrogated, abused, and denied access to counsel. (R. 219-20)

This account was completely contradicted by a State's witness, however. Chicago police detective McCarthy reviewed police reports and summaries of witness interviews before he made the arrest. (R. 246-51) One

person had already made a positive identification of defendant at that time. (R. 249) McCarthy called defendant's apartment and spoke to his wife to announce his arrival, and McCarthy presented his identification at the door before he was allowed entrance by Mrs. Williams. (R. 252-53) Defendant was then taken into custody. According to McCarthy, *Miranda* warnings were given at that time, and defendant was never abused in any manner. (R. 254)

Defendant never filed a motion to suppress statements (R. 381), and petitioner apparently concedes that no custodial statements were made or used as evidence at trial. (Pet. 3). (See also R. 379-80)

The trial court judge broadly construed defendant's "omnibus motion" to suppress identification evidence as a motion to quash the arrest as well. (R. 374) In the course of ruling on the motion, the court found that Mrs. Williams had consented to the officer's entry into the apartment. (R. 376, 379) The judge also found probable cause to support the warrantless arrest. (R. 376-77, 379) The court concluded that defendant failed to prove a denial of counsel during questioning to the extent that this "ancillary" argument was relevant to the motion at all. (R. 379, 381)

Defendant also called Mary Russell, Emma Ginns, and Carl Beasley as hearing witnesses. All three testified that they were subjected to police harassment calculated to obtain an identification of defendant. Ginns, for example, claimed she had seen police officers kick Beasley. (R. 95-96) whereas Russell heard the officers whip Beasley. (R. 62-63) Beasley never mentioned these events during

his own claims of police misconduct, however. (Finding, R. 384-85) Russell and Ginns added that they were denied food, telephone, and bathroom privileges. (R. 62, 92-93) This testimony was contradicted on all points by police officers. (R. 154, 157, 165, 202-205)

Although they were present in the tavern that night, Russell and Ginns testified that they never saw the shooter at all. (R. 57-58, 94) As a result, the State represented that it did not intend to call these witnesses at trial. (R. 320-21) The State also stated that it would not seek to introduce a pre-trial identification made by Beasley during its case-in-chief. (R. 384) After resolving witness credibility in the State's favor, the trial judge denied the motion to suppress identification testimony. (R. 383)

Neither Russell nor Beasley ever testified at trial. (Pet. 12) When Ginns appeared as a defense witness, she claimed she did not see the shooting and could not make an identification.

At the suppression hearing, Mrs. Williams also claimed that officers had twice searched the apartment when looking for defendant or for evidence. (R. 101-102, 105) No evidence was seized, no motion to suppress physical evidence was filed, and no physical evidence of this nature was presented at trial.

It should be noted that additional evidence concerning the officers' pre-trial investigation was adduced at trial. After occurrence witness Charles Clemons was unable to give a "100 per cent positive identification" from a photograph display (R. 599), Clemons viewed a lineup. Clemons indicated that defendant "looked something like" the shooter but he could not be "absolutely

positive." (R. 589-90, 664, 666) Defense counsel at trial proved that Clemons was unable to get a good look at the shooter. (R. 598-99)

After counsel's suppression motion was denied, counsel moved to dismiss the indictment on the ground of police intimidation of witnesses. (R. 1240-46) Ruling on the motion, the trial court observed that, notwithstanding counsel's allegations, counsel had conducted a prompt and thorough investigation (R. 404) and had been able to mount an "extremely aggressive defense". (R. 406) Counsel, if he wished, could prove bias or prejudice during cross-examination of witnesses at trial, but there was no reason that "the charges should just disappear." (R. 407) Because there was insufficient evidence to support defendant's allegation of official misconduct, the motion was denied. (R. 406-07)

REASONS FOR DENIAL OF THE WRIT

I.

THIS COURT SHOULD DENY THE WRIT WHERE THE COURT OF APPEALS FOUND THAT THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EVIDENTIARY RULINGS AND WHERE EVEN IF ERROR HAD OCCURRED, HABEAS RELIEF IS PROHIBITED.

Petitioner contends that the Seventh Circuit erred in denying habeas relief because the trial court evidentiary rulings improperly excluded evidence to support his frame-up defense and impeach the State's witnesses. Respondent answers that even if petitioner's argument is

meritorious, which respondent does not concede, such finding would be insufficient to grant habeas relief.

All courts have consistently held that habeas corpus courts do not sit to review mere evidentiary rulings. The collateral habeas proceedings were not designed to provide state prisoners an additional appeal. Unless petitioner can demonstrate an erroneous evidentiary ruling that directly infringed a particular provision of the Bill of Rights, or which resulted in a fundamentally unfair trial, petitioner has not alleged a federal question for habeas review. *Cramer v. Fahner*, 683 F.2d 1376, 1385 (7th Cir. 1982); *United States ex rel. Clark v. Fike*, 538 F.2d 750, 757-58 (7th Cir.), *cert. denied*, 429 U.S. 1064 (1976); *United States ex rel. Bibbs v. Twomey*, 506 F.2d 1220, 1222-23 (7th Cir.), *cert. denied*, 429 U.S. 1102 (1974); *United States ex rel. Harris v. Illinois*, 457 F.2d 191, 198 (7th Cir.), *cert. denied*, 409 U.S. 860 (1972).

A. Petitioner Was Not Deprived Of His Right To Present A Defense.

Petitioner alleges he was unable to "present a defense" because he was unable to introduce unspecified evidence of police misconduct in order to impeach State's witnesses. Examination of the trial record reveals that defense counsel sought to have detectives Rave and Cozzi treated as court's witnesses so they could testify concerning "treatment of certain witnesses." (R. 701-702) As counsel's argument progressed, it appeared that counsel wished to suggest intimidation of State's witnesses Grady, Clemons, and Tucker by means of proof that Rave

and Cozzi intimidated Ginns, Russell, and Beasley. (R. 701-14)

Russell and Beasley never testified at trial, however. (R. 705) Moreover, when defense counsel argued this point, Ginns had not yet testified. As a result, the trial judge correctly concluded that evidence concerning intimidation of Ginns, Russell, or Beasley would not be relevant unless or until these people testified at trial. (*Id.*) In a related manner, the judge believed that evidence of this nature would only serve to cloud the issues and confuse the jury. (R. 703)

Although an accused surely has a constitutional right to present a defense, there is no sixth or fourteenth amendment right to present irrelevant evidence. *See, e.g., United States v. Verkuilea*, 690 F.2d 648, 659 (7th Cir. 1982).

The district court held that, "absent some proof that the police misconduct affected the testimony of the State's witnesses or prevented Williams from offering exculpatory evidence, the alleged police effort to 'frame' him was not relevant to the question of whether William in fact had been the murderer."

B. The District Court Properly Held That Petitioner Was Not Denied His Right To Confront Witnesses.

Petitioner reformulates the same argument as above under the guise of sixth amendment confrontation and fourteenth amendment due process claims. In the district court, petitioner alleged he was unable to elicit the same evidence of police intimidation of Grady, Tucker, and Clemons during cross-examination of State's witnesses

Grady and Cozzi. Petitioner also claimed he was unable to ask leading questions on direct examination when defendant called Cozzi as his own witness.

This claim is equally unavailing. Respondents initially note that petitioner, in the record passages cited in his petition for writ of habeas corpus, failed to present a factual basis for his claim. In those passages, there is no indication that counsel sought to prove police intimidation of witnesses. Petitioner has waived this argument by his failure to lay the proper foundation.

During the People's case in chief, defense counsel extensively cross-examined Tucker, Glover and Clemons. During Tucker's cross-examination, defense counsel asked Tucker if at the time of his questioning at Area Four headquarters he had known that his mother Rose had been questioned at Area Four two days earlier. After Tucker responded that he had, defense counsel asked no further questions along that line. Aside from that one question, defense counsel failed to probe Tucker, Glover and Clemons on cross-examination for any possible effect of police misconduct on the veracity of their testimony. No attempt was made to lay the proper foundation for the impeachment of the People's witnesses by asking if their testimony was affected by any harassment or fear of harassment of themselves or their family members. The record does reveal that during Grady's cross-examination defense counsel sought to prove that Grady met Russell, Ginns, and Beasley after they returned from headquarters. The State's objection to the witnesses' speculation was properly sustained, however. (R. 543-46) Very simply, counsel did not seek to prove intimidation during cross-examination of State's witnesses. (R. 711-12) As the state

appellate court noted, " . . . defense counsel never cross-examined Tucker or Glover as to whether they had been intimidated by the police." (Op. 8) Defense counsel was also able to present his theory of police harassment in Jacqueline Williams' testimony and in argument.

Before the start of the defense case, defense counsel announced their intention to call as witnesses Detectives Rave and Cozzi, the officers who were involved in the early investigation and conducted the interrogations of Ginns, Russell and Beasley at Area Four. Defense counsel claimed that the evidence of the early stages of the investigation was relevant so that the jury could decide whether the identifications of Tucker, Glover and Clemons were reliable. *Id.* at 707. The trial judge responded that in his view evidence of police harassment of Ginns, Russell and Beasley would only be relevant if one of the three testified. Defense counsel then argued that Ginns and Russell's testimony about the interrogation procedures at Area Four was relevant to attack the identifications made by Tucker, Glover and Clemons at Area Four. Defense counsel further argued that if Tucker, Glover and Clemons had in fact been intimidated that they would not admit it on the stand because of their fear. But again, no attempt was made to lay a foundation. The trial court rejected those arguments and precluded inquiry in that area. *Id.* at 713-14.

Petitioner now claims that the trial judge's evidentiary ruling excluding evidence of the harassment of Ginns, Russell and Beasley which was intended to impeach Tucker, Glover and Clemons was error. But, as stated above, even if petitioner's argument is found to be meritorious, a mere finding that an evidentiary ruling was

erroneous is an insufficient basis for granting habeas relief. The conviction stands unless the error "amounted to a fundamental defect so great that it inherently resulted in a complete miscarriage of justice." *Cramer v. Fahner*, 683 F.2d 1376, 1386 (7th Cir. 1982), *cert. denied*, 459 U.S. 1016 (1982); *United States ex rel. Fuller v. Attorney General of Illinois*, 589 F.Supp. 206, 209 (N.D. Ill. 1984) (Aspen, J.), *aff'd*, 762 F.2d 1016 (7th Cir. 1985). The district court held that it need not reach that question, however, because it found that, "the trial judge acted within his discretion by keeping the evidence out. Standing alone, evidence of improper police conduct relating to Ginns, Russell and Beasley is not sufficiently probative of possible police misconduct relating to Tucker, Glover and Clemons to overcome the highly prejudicial impact such evidence would have had in the case." *United States ex rel. Williams v. Chrans*, No. 87 C 5242.

The district court went on to find that the trial court erred in its restrictions of Grady's cross-examination, but also held that "In summary, the record generally reveals that Grady was an insignificant witness in an otherwise strong State case. As a result, the court finds that the trial court's error did not deprive Williams of a fair trial."

II.

PETITIONER HAS FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW WHERE THE FACTUAL BASIS OF HIS QUESTION DOES NOT EXIST IN THIS CASE AND WHERE EVEN IF THE CONDUCT PETITIONER CLAIMS HAD OCCURRED, THE RESULT WOULD NOT HAVE CHANGED.

Petitioner contends that the "police misconduct in this case was indeed outrageous, had the purpose and effect of coercing fake testimony against the defendant, and irreparably tainted the evidence presented by the State at trial". (Pet. brief at 30) The district court disagreed, citing *United States v. Morrison*, 449 U.S. 361, 365-66 (1981), which stated that dismissal is inappropriate absent demonstrable prejudice, or substantial threat thereof.

The district court held that:

> "The court has already rejected most of Williams' claims of prejudice and now rejects the remainder. Williams' speculative claim that police misconduct *must* have affected State witnesses is not supported by the trial record. Moreover, Williams' conclusory statement that police misconduct crippled defense counsel's investigation is unconvincing absent some concrete connection between police misconduct and later discovered exculpatory evidence."

Williams does not and cannot claim that any evidence used at trial was obtained by improper means. For example, he alleges that he was abused and denied counsel during interrogation, but he concedes that no statement was thereby obtained or used at trial. (Petition for a writ of habeas corpus at 3) Petitioner also alleges that two

warrantless searches of his apartment were conducted. (*Id*). Even if a fourth amendment claim could be presented to a habeas court, *Stone v. Powell*, 428 U.S. 465 (1976), petitioner must acknowledge that no evidence was seized or introduced at trial. Finally, Ginns, Russell, and Beasley at the suppression hearing claimed myriad forms of police coercion (Pet. 4-6), but none of these persons gave identification testimony.

"Misconduct by the police, however, reprehensible, is not a ground for federal habeas corpus if it does not contribute to a conviction." *Miller v. Eklund*, 364 F.2d 976, 978 (9th Cir. 1966) (dismissing a similar claim of an unsuccessful attempt to obtain a confession). *Accord, In Re Faiola's Petition*, 185 F.Supp. 564, 572-73 (D. N.J. 1960). After Glover, Clemons, and Tucker gave identification testimony at trial, defendant's remedy for alleged police misconduct lay in cross-examination of those witnesses. Defendant was free to raise the issue of misconduct to impeach those witnesses for bias. As the trial judge noted, however, there was no reason for the "charges to disappear." (R. 407)

Since petitioner cannot show that any evidence was obtained by improper means, he falls back on his argument that the testimony, and therefore credibility, of the witness was affected by the alleged police misconduct.

Respondents challenge Williams' approach to matters of witness credibility. At the suppression hearing, defense witnesses claimed to have suffered abuse or coercion at the hands of police officers. For example, petitioner often returns to the testimony given by Ginns and Russell to argue that "glaring misconduct by the police was also

established by [this] sworn testimony." (Pet. Mem. 23) As the state trial and appellate courts noted, however, State's witnesses contradicted the testimony of defense witnesses.[1] Indeed, defense witnesses seriously contradicted themselves. After Ginns and Russell catalogued a list of abuses to Beasley, Beasley never claimed any police misconduct at all in his testimony. (R. 384-85) The trial court judge as trier of fact heard all the witnesses and dismissed petitioner's pre-trial motions. Although a petitioner in habeas may argue that determinations of the state courts are not fairly supported by the record, petitioner may not seek to relitigate witness credibility to prove his claims. *Maggio v. Fulford*, 462 U.S. 111 (1983); *Jackson v. Virginia*, 443 U.S. 307 (1979); *Milton v. Wainwright*, 407 U.S. 371 (1972) (all recognizing the exclusive responsibility of the trier of fact to resolve testimonial conflicts). In sum, petitioner must now accept the record as it is, and he may not seek to prove misconduct by parsing the record for defense testimony to afford it conclusive credibility. *Nelson v. Thieret*, 793 F.2d 146, 148 (7th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 418 (1986) (honoring the trial court's assessment of witness credibility despite petitioner's interpretation of the record in an "exculpatory manner"). Neither may petitioner hope to gain by making bald allegations unsupported by the record.

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[1] Petitioner adopts an uncharitable and unrealistic approach to government testimony. Conflicting testimony from State's witnesses is dismissed as "predictable", "pro forma", or as "simply incredible". At the same time, petitioner engaged in hyperbolic arguments without any support in the record. (Pet. Mem. 24, 25, 31)

Equally important, although the government denies any allegations of "outrageous governmental conduct", respondents wish to make two fundamental points here. The first of these concerns the appropriate remedy for claims of official misconduct. If, as in most of the cases cited by petitioner, evidence obtained by improper police practices was actually used at trial, then the conviction may indeed be constitutionally vulnerable.[2] By invoking the exclusionary rule, however, criminal defendants have a proper and adequate remedy in the form of evidence suppression. Official misconduct is not a reason for which to dismiss an indictment or vacate a conviction. Speaking in the context of indictment dismissal, the Supreme Court has held,

> absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate . . . The remedy in the criminal proceeding is limited to denying the prosecutor the fruits of his transgression.

United States v. Morrison, 449 U.S. 361, 365 (1981) (where defendant's motion to dismiss an indictment, alleging an "egregious sixth amendment violation," was properly

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[2] *See, e.g., Rochin v. California*, 342 U.S. 165 (1952) (where evidence of morphine obtained by improper means was used to prove defendant's guilt). *Rochin* was decided before the exclusionary rule was made applicable to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961). All of petitioner's other cases examine entrapment claims in which the exclusionary rule is inapposite because officers prompted the very act or crime for which defendant was later convicted. Outrageous government conduct defenses are perhaps appropriate in entrapment cases only. *Wilcox v. Ford*, 813 F.2d 1140, 1148 (11th Cir. 1987).

denied). *Accord, United States v. Sander*, 615 F.2d 215 (5th Cir.), *cert. denied*, 449 U.S. 835 (1980) (evidence suppression, not indictment dismissal, was the proper remedy after agents examined confidential files). As a result, the trial judge in the instant case concluded that defendant's allegations, even if proven, provided no reason that "the charges should just disappear." (R. 407) *See also Hampton v. United States*, 425 U.S. 484, 490 (1976) (retreating from dicta in earlier cases to decide that defendant's remedy lies in criminal or civil proceedings against the officers); *United States v. Agurs*, 427 U.S. 97, 110 (1976) ("the character of the evidence, not the character of the prosecutor" is the relevant inquiry); *Smith v. Phillips*, 455 U.S. 209, 219, 220, n. 10 (1982) (culpability of the prosecutor is "not relevant" for the due process clause); *Mabry v. Johnson*, 467 U.S. 504, 511 (1984) (the due process clause is not a "code of ethics for the prosecutor"); and *Miller v. Eklund*, 364 F.2d 976, 978 (9th Cir. 1966) (police misconduct, however, reprehensible, does not provide a basis for habeas corpus relief).

The second point concerns petitioner's failure of proof in the state courts. Petitioner, however hyperbolic his claims may be, cannot identify official misconduct so egregious as to have denied him due process of law. Indeed, as respondents demonstrated to the satisfaction of both the district and circuit federal courts, counsel during trial failed to prove any of petitioner's allegations of misconduct. As a result, there is no evidence of official misconduct in the record other than petitioner's self-serving, unsupported allegations. It is noteworthy, however, that in the proceedings reviewed in *Wilcox v. Ford*, 813 F.2d 1140 (11th Cir. 1987), the habeas petitioner also

alleged that police officers had abused potential witnesses. In marked contrast to the case at bar, the facts of abuse were actually established in *Wilcox*. While interrogating elderly and illiterate witnesses, officers there had threatened: to prosecute them; to hold them indefinitely; to lynch them; and to send them to the electric chair. Officers put words in the mouths of witnesses until they gave statements "to be able to go home", withheld food and water, and told one witness he was "headed for eternal damnation." 813 F.2d at 1147. Respondents certainly deplore such actions of police officers. The *Wilcox* court nevertheless did not find a due process violation, and the court refused a writ of habeas corpus. *See also United States v. Reynoso – Ulloa*, 548 F.2d 1329, 1339 (9th Cir.), *cert. denied*, 436 U.S. 926 (1977) (where officers' threats to kill defendant's friends did not constitute outrageous governmental misconduct); *Ker v. United States*, 119 U.S. 436, 7 S.Ct. 225, 227 (1886) (after officers sought to avoid extradition requirements by kidnapping defendant and holding him prisoner in a boat, "we do not think he is entitled to say that he should not be tried at all."); and *Frisbee v. Collins*, 342 U.S. 519, 520 (1952) (refusing habeas corpus relief although defendant was abducted, handcuffed, and blackjacked in order to bring him to trial).

Petitioner finally addresses the crux of all his claims when he alleges a "conviction based on false evidence" Review of each of petitioner's claims reveals he cannot draw the vital connection between alleged misconduct and evidence used at trial, however.

Petitioner sought habeas relief because police officers searched his apartment on two occasions. Williams has

conceded that no evidence was thereby seized for use at trial. (R. 350; Pet. Mem. 4) Indeed, counsel tried to capitalize on this fact during closing argument to the jury. (R. 997-98)

Petitioner alleges he was interrogated in the absence of counsel after his request for an attorney. (Pet. 3) The trial court found that defendant never proved his request for counsel (R. 379), and no custodial statement was taken or used at trial. (R. 379-80)

Williams claims that Ginns, Russell, and Beasley were forced to give coerced identifications. (App. Brief at 33-34) The State did not call these witnesses at trial, however. Faced with this dilemma, petitioner in federal habeas review sought to use the same allegations to challenge the identification testimony that was indeed given by State's witnesses Glover, Clemons, and Tucker. According to petitioner's hypothesis, Ginns, Russell, and Beasley reported their "ordeal" with the police to State's witness Grady. Grady then shared this information with Glover, Clemons, and Tucker. ("News of the ordeal suffered by Russell, Ginns, and Beasley spread to the other witnesses." Pet. 17) Glover, Clemons, and Tucker, motivated by fear, were then persuaded to "pin the murder" on petitioner with false identifications. (Pet. Mem. 54) No evidence to this effect was presented in the trial court, however. In no record passage cited has appellant indicated that counsel sought to prove police intimidation of any witness other than Grady. During the State's case-in-chief defense counsel extensively cross-examined Tucker, Glover and Clemons. During Tucker's cross-examination, defense counsel asked Tucker if at the time of his questioning at Area Four headquarters he had known that his

mother Rose had been questioned at Area Four two days earlier. After Tucker responded that he had, defense counsel asked no further questions along that line. Aside from that one question, defense counsel failed to probe Tucker, Glover or Clemons on cross-examination for any possible effect of police misconduct on the veracity of their testimony. In the end, petitioner is forced to assume evidence not in the record or to engage in rampant speculation to demonstrate resulting prejudice. ("The testimony of Grady, Clemons, and Tucker must have been affected." Pet. Mem. 26) (See also Pet. Mem. 38: "we can never know whether news of this misconduct affected other witnesses.") In sum, there is no evidence in this record that identification made by State's witnesses were tainted by improper police practices.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROBERT J. RUIZ
Solicitor General
State of Illinois

TERENCE M. MADSEN*

RICHARD S. LONDON
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5029

Counsel for Respondents.

*Counsel of Record

(3)

Case No. 90-497

IN THE

United States Supreme Court

OCTOBER TERM, 1990

JAMES WILLIAMS,

Petitioner,

v.

JAMES A. CHRANS, Warden of Pontiac Correctional Center, and NEIL F. HARTIGAN, Attorney General of the State of Illinois,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BARRY LEVENSTAM
(Counsel of Record)

ROBERT T. MARKOWSKI
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

LISA I. FAIR
Law Offices of Michael J. Rovell
875 N. Dearborn Street
Chicago, Illinois 60610
Attorneys for Petitioner

12

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

In his opening brief, petitioner Williams showed that he was precluded from presenting an entire defense to the jury although, as this Court recognized in Chambers v. Mississippi, 410 U.S. 284, 302 (1973), the right to present a defense is a fundamental constitutional right. Williams further showed that he was precluded from cross-examining and impeaching the State's witnesses in violation of Davis v. Alaska, 415 U.S. 308 (1974). In response, the State ignores Williams' claim that his conviction was obtained in derogation of these fundamental rights and instead suggests that his claim addresses "mere evidentiary rulings," which are insufficient grounds for granting habeas relief. (See State's Br. at 8-9.)

The "mere evidentiary rulings" at issue in fact precluded Williams from adducing an entire category of evidence necessary to establish that he was framed

by the police for murder, one of his two principal defenses (the second being an alibi defense perfectly consistent with the frame-up defense). These rulings also precluded Williams from impeaching the police officers by demonstrating that they had engaged during their investigation in misconduct calculated to create evidence against him.

ARGUMENT

The State attempts to justify the trial court's rulings by suggesting that the evidence of police misconduct Williams sought to introduce was "unspecified" (State's Br. at 9) and that the credibility of the defense witnesses was resolved "in the State's favor" at the pretrial hearings (State's Br. at 7). Both of these propositions are incorrect.

First, the evidence that Williams sought to introduce is detailed at pages 17-21 of his petition for certiorari.

Williams was precluded from examining the police officers on the subject of their investigation to demonstrate how they focussed on Williams without provocation and then took steps to create a case against him. His apartment was searched without a warrant, he was arrested without a warrant on the basis of a hearsay statement, potential witnesses (Russell, Ginns, and Beasley) were jailed and abused until they agreed to identify Williams, and Rose Tucker, the mother of the man who came to be the State's primary identification witness at trial, was similarly called to police headquarters for an "interview." Williams also attempted to call Russell, Ginns, and Beasley to detail the ordeal they suffered as the police attempted to obtain identification testimony from them.

Without this evidence, Williams could not establish that the police wanted Williams badly enough to entice the

victim's brother into fabricating a story that would give Williams a motive and, more importantly, could not explain the significance of Andrew Tucker volunteering to identify Williams only after his mother was taken to headquarters by the same officers who held Russell, Ginns, and Beasley in custody.

Second, contrary to the State's assertions at pages 7 and 8 of its brief, the trial court never found these witnesses unworthy of belief and did not deny the pretrial motions to suppress and dismiss because of insufficient evidence. (See also State's Br. at 16.) Rather, the State withdrew Russell, Ginns, and Beasley from its witness list at the end of the hearing. The trial court then held that there was no need to rule on the motion to suppress those witnesses. As for Williams' motion to dismiss the charges because the police officers' coercive tactics had tainted the

witnesses, the court simply ruled that the jury should hear the same evidence and evaluate all of the witnesses itself (Tr. 406-07) -- a ruling it reversed without warning at trial when Williams attempted to present this very evidence to the jury. (Tr. 703.)

When the trial court decided to exclude all evidence of the police misconduct during the investigation, it eviscerated William's frame-up defense. Without that evidence of misconduct, the jury had no reason to discredit the testimony of Detectives Rave and Cozzi, who engaged in the misconduct and testified against Williams. Without that same evidence of police misconduct, the jury had no understanding of how the police had coerced identifications of Williams and therefore no basis to conclude that they had coerced Tucker into testifying by mistreating his mother, Rose Tucker, when

she was at the police station as were Russell, Ginns, and Beasley. And without that evidence of police misconduct, the jury had no way of concluding that the police had caused Glover to fabricate testimony to implicate Williams by leading Glover to believe that Williams had killed his brother.

The State argues, without any support, that the testimony of Glover and Tucker could only be discredited by their own lips -- that is, by an admission on cross-examination that they had been coerced. (See State's Br. at 9-11, 15.) This argument is both factually and constitutionally untenable. A witness that the police had coerced into first making an identification and then testifying to that identification on direct examination cannot generally be expected to turn around and admit to being coerced on cross-examination -- in front of the very people

responsible for the coercion. Moreover, the State completely ignores the fact that the excluded evidence of police misconduct also would have impeached the testifying police officers. Williams attempted to confront these police officers with their own misconduct, but the trial court flatly precluded that impeachment.

The State attempts to shift this Court's attention from the relevance to Williams' frame-up defense of the proffered testimony of Rave, Cozzi, Russell, Ginns, Beasley, and Grady by suggesting that the police misconduct did not yield any evidence subject to the exclusionary rule such as a coerced confession or improperly-seized physical evidence, the remedy for which would be suppression. (State's Br. at 14-18.) Evidence of improper searches, arrest, and interrogation, however, was part and parcel of Williams' frame-up defense and was necessary to demonstrate

that the police focussed on Williams immediately for no apparent reason and then took extreme steps to fabricate a case against him.

Nothing in this Court's decisions in Chambers v. Mississippi, Davis v. Alaska, or their progeny, permit the State to infringe upon a criminal defendant's Sixth Amendment right to defend himself by excluding evidence of a frame-up defense. Nothing in those decisions permits the State to dictate the way in which a defense should be presented. Williams had a constitutional right to present this evidence to the jury and the trial court's rulings prevented him from doing that. Consequently, his conviction is constitutionally unfair and he should be granted a writ of habeas corpus.

CONCLUSION

For the reasons set forth above and in his Petition, James Williams respectfully requests this Court to grant his petition for a writ of certiorari.

Respectfully submitted,

BARRY LEVENSTAM
(Counsel of Record)
ROBERT T. MARKOWSKI
LISA I. FAIR

Attorneys for Petitioner

Dated: February 12, 1991